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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 46

VIRGIL HERDMAN, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 12, 1956

CERTIORARI GRANTED APRIL 16, 1956

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[fol. 1] **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

Civil No. 3235

VIRGIL HERDMAN, 714½ N. High Street, Columbus, Ohio,
Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a corporation,
Defendant

RELEVANT DOCKET ENTRIES

1951

August 13. Complaint filed.
August 13. Summons and copy Complaint to M. S. D. O.
September 8. Summons returned executed on 8-27-51—filed. Fees 2.20.
September 13. Answer of defendant filed.

1952

January 12. Interrogatories of plaintiff filed.
January 23. Plaintiffs trial brief filed.
February 25. Answer to Interrogatories filed.
July 7. Motion of plaintiff for production of documents, etc. filed.
August 7. Trial brief of defendant filed.
August 15. Memo of defendant contra plaintiffs motion filed.
[fol. 2] September 3. Reply memo of plaintiff filed.
September 30. Memo—motion for production, etc. overruled filed—Entry.
October 10. Entry on memo of 9-30-52 filed.

1953

February 3. Interrogatories filed.
April 1. Answer to interrogatories filed.
September 14. Deposition of Chas. L. McGee—filed.
September 17. Deposition of Chas. L. McGee—filed (supp.).

1954

January 21. Motion of plaintiff for leave to amend filed.
January 21. Entry granting leave to file amended complaint filed.
January 21. Amended complaint filed.
January 21. Answer to original complaint refiled to Amended complaint.
January 22. Trial—Jury empaneled & sworn—Test. on behalf plff. Test. not concluded—adj. 10:00 A.M.
January 25. Trial continued—Test. on behalf plaintiff—concluded. Plff. rests—Motion of defendant for directed verdict—motion sustained.
January 25. Verdict filed.
January 25. Judgment for defendant filed.
February 2. Motion of plaintiff for new trial filed.
February 2. Motion of plaintiff to extend time for filing of brief in support of motion for new trial filed—approved.
February 3. Subpoenas (3) returned executed and filed.
December 17. Entry overruling motion for new trial filed.
December 17. Notice of appeal filed—copy mailed R. L. Barton.

[fol. 3] 1954

December 17. Bond on appeal filed.
December 17. Statement of points relied upon filed.
December 17. Reporters transcript filed.
December 17. Designation of record on appeal filed.

1955

January 12. Transcript of record on appeal to U. S. Court of Appeals.

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed January 21, 1954

1

Defendant is a railroad corporation organized and existing under the laws of the State of Pennsylvania and was

at all times hereinafter mentioned, and is now, carrying on business within the jurisdiction of this court as an interstate common carrier of passengers and freight into and from various states of the union, a portion of whose tracks extend into and through the City of Columbus, County of Franklin, State of Ohio. Plaintiff's cause of action hereinafter set forth arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149 and amendments thereto, commonly known as the Federal Employers Liability Act, 45 U.S.C.A. Secs. 51-59. Plaintiff is a resident of the State of Ohio.

2

On or about February 1, 1951, plaintiff was employed by the defendant as a freight conductor in the furtherance of interstate commerce. On that date plaintiff was working [fol. 4] for defendant and was riding in the caboose of an east bound train being operated by the defendant in or near the City of Dayton, Ohio. Without warning to plaintiff, defendant caused its train to make a sudden emergency stop which caused plaintiff to be thrown violently from one end of the caboose against the wall of the opposite end of the caboose and then onto the floor resulting in injuries to the plaintiff as hereinafter set forth in greater detail.

3

At all times hereinafter mentioned the locomotives, freight cars and caboose making up the entire train on which plaintiff was riding on or about February 1, 1951 was under the sole and exclusive control and operation of the defendant and plaintiff's injuries were the direct and proximate result of defendant's control and operation of said train.

4

Plaintiff's injuries were the direct and proximate result of the negligence of the defendant in one or more of the following particulars, to-wit:

1. Defendant failed to provide plaintiff with a reasonably safe place to work.
2. Defendant so operated its train as to throw it into an emergency stop causing plaintiff to be thrown from one end

of his caboose into and against the wall and floor at the other end of the caboose.

3. Defendant failed to warn plaintiff of the sudden emergency stop.

5

As a direct and proximate result of the negligence of the [fol. 5] defendant as aforesaid, plaintiff received a severe blow to his head, shoulder, back and hip causing injuries to the bones, muscles, tissues, blood vessels and nerves of the head, neck, back and lower extremities. As a result of said injuries plaintiff was totally disabled and required medical care; he incurred medical expense and continues to remain totally disabled. Said injuries have caused plaintiff to be sick, sore, lame and disabled and necessitate the use of a cane by plaintiff in movement. Plaintiff will continue to incur additional medical expense in the future, the exact amount of which cannot now be stated, all to plaintiff's damage in the sum of $75,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $75,000.00 and his costs herein expended.

(S.) Kenneth Agee, Attorney for Pltf.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

(S.) Kenneth Agee, Attorney for Pltf.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed September 13, 1951

1. Now comes the defendant, The Pennsylvania Railroad Company, and for its answer to the complaint of the plaintiff filed in this case admits all of the allegations contained in the first paragraph of the plaintiff's complaint.

[fol. 6] 2. Defendant admits that on or about February 1, 1951, the plaintiff was employed by the defendant as a freight conductor in the furtherance of interstate commerce. Defendant further admits that on said date the plaintiff was working for the defendant and was riding in a caboose of an eastbound train being operated by the defendant in

or near the City of Dayton, Ohio. The defendant denies all of the other allegations contained in Paragraph 2.

3. Defendant denies all of the allegations set forth in Paragraph 3 of the plaintiff's complaint.

4. For want of definite information the defendant denies all of the allegations contained in Paragraph 4 of the plaintiff's complaint.

Wherefore, having fully answered, defendant prays that the complaint of the plaintiff may be dismissed and that the defendant may go hence with its costs.

Bricker, Marburger, Evatt and Barton. By (S.) Robert L. Barton, Attorneys for Defendant.

Copy mailed to Kenneth Agee, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

Partial Transcript of Proceedings—January 22, 1954
(Filed December 17, 1954.)

Before Honorable Lester L. Cecil, Judge, At Columbus, Ohio, and a Jury.

[fol. 7] APPEARANCES:

For the Plaintiff: Donald McNamara, Esq.
For the Defendant: Robert L. Barton, Esq., John Eckler, Esq.

Morning Session
Friday, January 22, 1954

Mr. VIRGIL HERDMAN, being duly sworn, testified as follows:

Direct Examination.

By Mr. McNamara:

Q. Will you state your name please?
A. Virgil Herdman.
Q. Where do you live, Virgil?
A. I stay with my dad and mother, Leon, West Virginia.

Q. And did you tell somebody there?

A. I asked my engineer what happened over on the west side.

[fol. 28] Q. I don't want to get into any conversation, what you told him. Did you report to him or report to anybody that you had been injured?

A. Told both engineers.

Q. That is, on both the steam engine and the Diesel?

A. And the Diesel.

Q. When you were running under such a situation as you were running there, as I understand it, the steam engine was out in front and the Diesel behind it? Is that right?

A. Right.

Q. Can the engineer on the Diesel, by means of that braking lever control the air braking situation?

A. He would have to have went past his instructions and his authority to cut his air back. His cut-out cock, they call it. The man on the second engine doesn't have control. The front man has the control.

Q. Is it possible for the man on the second—the engineer on the second locomotive to cut off the air?

A. He could have turned his cut-out cock and could have did it.

Q. Is there any way, riding back in the caboose that you could tell which locomotive might have caused the cut off of the air?

A. No, sir.

Q. After you got into Clement yards and you switched cars, then where did you go?

A. Came on toward Columbus.

Q. Came on to Columbus that same day?

A. That is right.

[fol. 29] Q. And when you arrived in Columbus, did you make some report of this incident?

A. Yes, sir.

Q. And to whom did you report such a thing?

A. It was near midnight when we got in and I reported it over to the yard office, to the clerk, and got a cab to the house.

Q. That is to your house?

A. Yes, my room.

Q. Do they live right in town?
A. No, back in the rural district.
Q. That is R.F.D.?
A. R. F. D. 1, yes.
Q. About how far out of Leon, do you live?
A. Two miles.
Q. Two miles?
[fol. 8] A. Yes, sir.
Q. And what part of West Virginia is Leon located in?
A. It is in Cologne District, County of Mason.
Q. How old are you, Virgil?
A. Past fifty.
Q. When did you go to work for the Pennsylvania Railroad?
A. In 1929.
Q. And where did you go to work for them, Virgil?
A. On the Toledo Division.
Q. On the what?
A. Toledo Division.
Q. As I understand it——
A. Toledo Division over here in Columbus.
Q. All right. When you went to work on the Toledo Division, did you come to Columbus to go to work?
A. I hired out here.
Q. Where had you been living then, down in West Virginia?
A. Yes, part of that time.
Q. Where were you raised?
A. I am a native, born and raised down there.
Q. And you hired out to the Pennsylvania Railroad in 1929. That was here in Columbus?
A. Yes, sir.
Q. What was the nature of your work then, when you hired in?
A. Train service, brakeman.
[fol. 9] Q. As a brakeman. Did you continue to work for the Pennsylvania Rairoad regularly, from then on until 1951?
A. Yes, sir, except when I was furloughed. Once in a while you get furloughed. I was still on the roster and always to be called.
Q. By furloughed, you mean just laid off?

A. Reduction of force.

Q. And then they called you back, according to seniority; is that it?

A. That is right.

Q. Did you continue to work in what is known as train service for the railroad?

A. Yes, sir.

Q. And have you always been in the train service?

A. Yes, sir.

Q. During that period of time, did you ever do any other work, except as a brakeman? Did you work as fireman?

A. They used to use us as firemen now and then. When they was short of firemen, they would call us brakemen.

Q. You have served as fireman?

A. Yes, sir.

Q. Did you ever serve as engineer?

A. No, sir.

Q. You have worked up in the locomotives?

A. Yes, sir.

Q. Back in 1951, during the month of January 1951, had you been working for the Pennsylvania Railroad?

[fol. 10] A. Yes, sir.

Q. And about how much of that month did you work, do you recall?

A. I can't exactly remember the dates. I had pneumonia in December and went back to work in January and I don't remember the exact dates.

Q. Did you work as much as half of January, do you think, or was it even less than that?

A. Well, I don't remember.

Q. Now, Mr. Herdman, did you have any particular run while you were working for the Pennsylvania Railroad in 1951?

A. Yes, sir.

Q. And will you tell us where that run was?

A. That was a regular run from Columbus, Ohio, to Richmond, Indiana and return.

Q. Now, did you have regular hours when you would go to work and when you would come back?

A. Well, supposed to have regular hours, but we never got in in time to get out like that.

Q. Would you normally leave Columbus any particular time of day?

A. Whenever they could get the train ready and called us.

Q. Did this train have any particular number or identification?

A. They had a symbol.

Q. By symbol——

A. CN7 and 8.

Q. What did that stand for? Is that the identification of the train?

[fol. 11] A. That was just one of the symbols that the company put on it.

Q. Now, when you say you worked from here to Richmond and back, will you explain—Did you have a title at that time?

A. What do you mean? I was conductor.

Q. That is what I mean. You were freight conductor?

A. That's right.

Q. Explain what the nature of the work is? What does a freight conductor do?

A. Well, he is in charge of the train and the bills, doing the writing and setting off of the cars, picking up cars.

Q. All right. Now, as a freight conductor, do you always ride on one particular end of the train?

A. Well, ordinarily do unless something unexpected happens and you have to go elsewhere.

Q. Ordinarily you ride in the caboose, is that right?

A. That's right.

Q. Ordinarly, does somebody else ride back there with you?

A. Flagman.

Q. You and the flagman as a rule are all who ride in the caboose?

A. Usually, yes.

Q. Now about how long a run was it from Columbus to Richmond, or Richmond back to Columbus?

A. I think our schedule was 114 miles.

Q. And about how much time element was usually involved in making that run?

[fol. 12] A. Well, that varied very much, on account of passenger trains.

Rusoff? I mean professionally speaking. When did you see him for treatment or examination or anything, or did you ever see him again?

A. I seen him, yes.

Q. You have seen him. He has examined you, as I understand it, recently?

A. Right. I can't tell you what date it was.

Q. Between September 1951 and recently had you seen Dr. Rusoff?

A. It has been this week.

Q. Before this week, had you seen Dr. Rusoff for treatment since September 1951?

A. No. I went to an osteopath clinic.

Q. Where did you go to that clinic?

A. Point Pleasant, West Virginia.

Q. Do you know about when you went to that clinic?

A. Well, the doctor came to my father's house to see me immediately after I went down there to stay and they—either came there or I would have—if I would be able they took me to the doctor, hospital and clinic once a week.

Q. Did you have treatment at the clinic, Virgil?

A. I did.

Q. Will you describe what kind of treatment you got?

A. They used heat treatments; they used massage; they used medicine.

[fol. 33] Q. Were you at that clinic and received treatment on more than one occasion?

A. Oh, I went there for several months.

Q. And how frequently would you go there—would you go more than once a month?

A. Once a week.

Q. Did you pay for those doctor calls or trips?

A. I did.

Q. Do you remember about what they cost you?

A. It run anywhere from $7 to $15 every week, every trip.

Q. Then did you have any other medical treatment, Virgil, after you stopped going to that clinic? Did you have any further medical treatment?

A. I have been to other hospitals, been x-rayed. But as far as medical treatment or taking medicine, no.

Q. That means you would take sidings or stay in the yards and wait for the regular passenger trains?

A. That's right. Maybe the yard wouldn't release us or something like that.

Q. And did you normally make the run over and back the same day?

A. Usually, yes.

Q. You would go to Richmond——

A. It was a seven-day job. We would go east one day and west the next.

Q. You didn't make the complete round trip in one day?

A. No. We laid over in Richmond.

Q. And then came back the next day?

A. Yes and laid over in Columbus and then go back to Richmond the following day.

Q. At that particular time you say it was a seven-day job?

A. It was.

Q. You didn't have Saturday and Sunday off?

A. No time off.

Q. Can you tell us reasonably close the manner in which you were being paid, on or about February 1, 1951?

A. Well, it is based on mileage and overtime. There was a limit up to a certain amount of miles and then overtime started.

Q. How often did you get paid on the railroad?

A. Twice a month.

[fol. 13] Q. And can you tell me about what your average day's pay was, or your average pay-period pay was, at that time?

A. Well, that varied for reasons of overtime involved and amount of hours.

Q. When you normally worked a full pay period about what was your average pay?

A. Oh, sometimes it would be two hundred or more; sometimes a little less.

Q. Now by full pay period, I mean just half the month; is that right? Your pay sometimes would run as high as two hundred?

A. Sometimes over two hundred; sometimes less.

Q. What would be its unusual low limits? Would you ever make as little as $100 during that time?

A. Not unless you would have to lay off for some reason.

Q. Not unless you were off work?

A. That's right. If you had some reason for being off, you didn't get paid for it.

Q. Virgil, what was the work that a conductor would do with those bills that you referred to? When you would start out on a run, what did you do with the bills?

A. Well, we had to check them, read them, write them up and just charge the bills wherever we had cars to set off.

Q. Did you have a bill for each freight car?

A. We were supposed to.

Q. That is the way they set them up?

[fol. 14] A. That's right.

Q. You have one bill for each freight car?

A. That's right.

Q. Are those given to the freight conductor when the train pulls out of the yard?

A. They are given to the yard master or one of his clerks, usually give them to you prior to departing from the yard.

Q. So you did have them at the time you departed?

A. That's right.

Q. And then as the train goes along between Columbus and Richmond, or Richmond and Columbus, do they usually set cars off from time to time, at various places?

Mr. Barton: I don't like to interrupt. I don't see the materiality of this testimony as to the accident that took place on this day, and that is all this jury is interested in.

Mr. McNamara: Well, you may be right. I just want to show their general activities, the nature of the work of the conductor, what he was supposed to do, the general movement of the train, and if the Court thinks we are far afield, we will stop.

The Court: Without going too much in detail, I think you may show it.

Q. Now was it your duty to hand off these bills at wherever you would stop and leave freight cars, or pick up freight cars?

A. Yes, sir.

Q. Going back to the morning of February 1, 1951, do

[fol. 15] you recall that particular day and where you started with your train that day?

A. At Richmond, Indiana.

Q. Had you laid over in Richmond the night before?

A. Yes, sir.

Q. And when your train was made up at Richmond and you started out, where did you start for?

A. Columbus.

Q. Your destination was Columbus?

A. Right.

Q. Do you remember about what time of day you pulled out of the yards or left the yards at Richmond?

A. I don't remember, but we had to keep reports, delay reports of the particular time and even write it up on our wheel reports, but I can't remember the time.

Q. You think you left in the morning. Do you think you left in the morning or the afternoon?

A. Well, it was near noon. It wasn't early in the morning.

Q. Do you remember when you left Richmond that day what your train consisted of?

A. Well, we had a steam locomotive and a Diesel locomotive and I don't remember exactly, sixty some bills and the caboose.

Q. If you had sixty some bills, you would also have sixty some freight cars; is that correct?

A. We should have, yes.

Q. Now, between Richmond and Dayton was there any-[fol. 16] thing particular happened that you remember in reference to your train between those two cities?

A. No, just regular performance, regular run.

Q. Where were you riding in the caboose, do you recall, as you came into the city of Dayton?

A. Well, we was in the rear end.

Q. Do you recall the name of the flagman who was with you?

A. It seems to me that his name was Ford, but he was a stranger to me. That is the only trip that I ever seen the man.

Q. Now, as you came and was riding through the city of Dayton, can you describe a little bit what the caboose looks like on the inside and where you were?

A. Well, we were sitting on a bunk in the west end.

Q. West end would be towards the rear end of the caboose?

A. It was the rear end. We was eastbound.

Q. Was the bunk on the north or south side?

A. The bunk was on the south side or right side. It was coming east.

Q. What else generally is there in that caboose?

A. Oh, there is a stove and table, some lockers, two other bunks and a cupola with steps to get up in the loft, if necessary to ride up there.

Q. Would you tell what type of caboose was this, was it wooden or metal?

A. It was an old type, wooden caboose.

Q. Did it have in it any type of communications system [fol. 17] with the locomotive?

A. No, sir.

Q. As you came through the city of Dayton, will you describe just what happened, Virgil?

A. Well, we were coming through there at a slow like speed and I don't know what went wrong, the train went in emergency and threw me into this table and tore it up and I was up on the floor with my flagman on top of me, when we finally got straightened up.

Q. Virgil, when the train went into what you call an emergency situation or emergency brake situation, does it make any noise? Did you hear anything?

A. Well, there is a noise whenever it goes in but I didn't have time to do anything about it.

Q. What happens to the wheels on a train when it goes into an emergency braking situation?

A. They lock.

Q. The wheels are locked?

A. If the air brakes are perfectly working it will lock the wheels on the car.

Q. Now will you explain how freight cars generally are coupled together?

A. Well, we have a drawbar in each end of the car and in this drawbar are knuckles that open hinge-like; they open and close, so when the cars come together and they go together and close, they lock.

Q. When they lock, do they lock perfectly tight or is [fol. 18] there a certain amount of leeway?

A. Well, they lock but it wouldn't be locked perfectly tight, you know; there would be a little bit of movement there.

Q. And what is that movement called?

A. Well, slack.

Q. About how much slack action is there between each of two freight cars, or in each coupling?

A. Well, they vary. Different type cars could have a different slack, some of them more than others.

Q. Would you explain what the least amount of slack action is in the average car?

A. Oh, I would say maybe six inches or a little more.

Q. And is that——

A. In a drawbar, that is to the end of each and every drawbar.

Q. What is a drawbar for?

A. That is to couple; that is the iron that pulls the other part of the train.

Q. Are there springs in that coupling also?

A. There is yokes back of the drawbar with coil springs.

Q. When the train goes into emergency situation, in the braking situation, what happens to that slack?

A. Well, it is stretched out. It bunches it. They run up together solid.

Q. That is, the rear cars are forward?

A. They run in the direction that they were traveling.

[fol. 19] Q. Will you explain what the braking situation was on that train? What type of brakes was there on that train?

A. Well, there is various type brakes. Most of the later equipment is what they call the A-B.

Q. I mean on this particular type of train. I understand that it is an air——

A. It was a regular air.

Q. It is an air brake?

A. That's right.

Q. It isn't a mechanical brake where you push a lever and push one piece of metal against the other. Now will

you describe just how the air brakes on this train function, what makes them work and how they work?

A. Yes. There is a train line, an air hose which is connected from one car to the other, and the engine has air pumps up there that charges or pumps up the entire train and it is controlled, you know, by the engineer or the man operating the engine.

Q. What kind of control is there on the locomotive that operates this brake?

A. They have a control valve.

Q. Will you explain how it is operated? How does the engineer operate that?

A. Well, when he has his engine on, he will have his control valve in whatever position he desires, or is necessary for him to either pump the train up, train lines. Pump it up releases the brakes and when he draws off the air that will apply the brakes.

[fol. 20] Q. Now how does this braking device operate? Is it operated by foot or hand?

A. Hand.

Q. It is a hand lever?

A. Hand control, yes.

Q. And as the engineer sits on the seat box, what they call the seat box up there, where is this hand lever with reference to his position, generally speaking?

A. Just a little bit to the front and a little bit, maybe, to the left of the engineer.

Q. It is in front of him?

A. Yes, a little forward and to the left.

Q. And is it pretty much in the same location in all steam locomotives?

A. Well, yes.

Q. So that this particular type of steam locomotive wouldn't have been different from any other type of steam locomotive?

A. Not very much.

Q. All right. Now, is there a gauge or something up there that they can tell about this air pressure?

A. Sure.

Q. And is that directly in front of the engineer some place or other?

A. That's right.

Q. What would be normal air pressure?

A. About seventy pounds.

[fol. 21] Q. Is there some sort of thermometer-like device or something?

A. There is gauges.

Q. And is the gauge marked so you can tell when it is seventy or fifty pounds?

A. It has got figures on it.

Q. Is there a similar device back in the caboose?

A. There is an air gauge.

Q. There is an air gauge. And does it record back in the caboose just the same as it records at the other end, in the locomotive?

A. Well, it registers. If you get a leaky train line, it might be a little bit less than what the engineer's was, but it would tell you you had pressure, your air was high or low.

Q. As you were riding in that caboose that particular day, coming in towards Dayton, do you recall whether or not you ever looked at that particular air gauge?

A. Well, it had been up to standard before.

Q. It had been near the seventy-pound mark then?

A. Yes, sir.

Q. And that is about standard, you say?

A. That is right.

Q. Now how does that air come from one car to the next?

Q. By going through the train line and through those air hose.

Q. What is a train line?

A. It is an iron pipe that is fitted on each and every car and it has an air hose connected on the end. Whenever they are connected by hand they interlock so as to have air [fol. 22] over whatever amount of distance that you want, say for each and every car in the train.

Q. What you refer to as a train line, that is an actual pipe or something?

A. That is an actual pipe and the air hose is flexible.

Q. That is the coupling that you couple in between the cars that holds the air line together?

A. That's right.

Q. Whereabouts on the freight cars is this train line?

A. Underneath.

Q. It is on the bottom side of it. So that by coupling the hose between each car, you have a continuous line of air pressure; is that right?

A. That is right.

Q. Now is the air pressure on each car controlled and regulated by the locomotive?

A. Yes, sir.

Q. Does that lever up there regulate all the——

A. That will control the brakes on the entire train.

Q. After this emergency braking situation occurred and you said you were thrown, then what happened, Virgil,—what did you do next?

A. Well, as soon as I could, I got up. I looked at my gauge. I see we didn't have any air and I got off and I started the best I could to go towards the engine to see what the trouble was, and I got a very few cars, why, air started to release and I hopped back toward the caboose. I knew then there weren't any broken hose or broken train [fol. 23] lines or busted hose, or anything to cause it.

Q. Then what did you do, get back into the caboose?

A. I got back into the caboose.

Q. When you say you had walked a few cars forward and you heard the air coming in the line, is there some noise or something that you could hear?

A. Yes, there is a noise, when the air is coming back. You can hear the hissing noise when this air pumps up and starts releasing the pistons.

Q. When the engineer released the pistons in the locomotive, the air come back through the line again?

A. That's right.

Q. And you can hear the hissing noise as the air comes back through the line?

A. Yes, sir.

Q. What does that hissing noise tell you?

A. It told me my train line and air hose and everything were all right.

Q. But if the air hose had been broken, as I understand it, it wouldn't have been possible then for the air to get all the way back to the caboose?

A. It couldn't get back to the caboose.

Q. What does that tell you in your railroad knowledge as to what caused the emergency braking situation?

A. Something went on on the front end.

[fol. 24] Q. And by the front end you mean the locomotive?

A. Well, yes, upon the engine.

The Court: I think we will take our noon recess at this time. Return at two o'clock. Keep in mind the admonitions which I have given you, please.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session

Friday, January 22, 1954.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded, as follows:

Mr. VIRGIL HERDMAN resumed the witness stand and testified further on direct-examination, as follows:

By Mr. McNamara:

Mr. McNamara: Read the last question and answer.

(Thereupon the last Q. and A. thereto were read by the reporter.)

Mr. McNamara: That noise you heard along side the car and apparently I asked you what that told you and then you gave the answer: Something went on up in the front end.

Q. Then, Virgil, after being outside and along side of the freight cars and hearing that noise, then what did you do?

A. I went back and got on the caboose and looked at my air gauge.

[fol. 25] Q. Do you remember looking at your air gauge? Do you remember anything about it?

A. Certainly. That was one of my duties.

Q. What did the air gauge show you then?

A. The hand starts coming up, you are getting the pressure back.

Q. Hand goes up as the pressure increases, is that it?

A. That's right, to release the brakes.

Q. How do you get increased air pressure on that gauge?

A. The engineer up on his control valve, when he puts that in release, it starts pumping the air back to the rear end or to the rest of the train.

Q. And that is a mechanical device controlled up in the locomotive; is that it?

A. It is hand operated.

Q. Is that the same device that they put the brake on with?

A. Yes, sir.

Q. And then describe what happened after you got back in—what did you do?

A. Well, they started and, you know, so they could get the brakes released, the train started and he proceeded on.

Q. Eastwardly that would be, in a general direction to Columbus?

A. That's right.

Q. Forward direction. Virgil, this area, when you got out of the caboose after that spill,—can you describe what the area is like around there?

[fol. 26] A. Well, it is residential and, I don't know, factories and different things, little stores and cafeterias.

Q. Do you know, is it primarily a residential district along there?

A. Well, there seemed to be a lot of dwellings through there.

Q. Is that one of the better residential sections of Dayton?

A. I am not that well acquainted about the town. I don't know whether it is a classy place.

Q. All right. Virgil, do you know where you were in reference to any stop that you were to make, or do you know where your next stop would have been, if you had continued?

A. Up to Clement yards.

Q. Now is Clement yards still inside of the city of Dayton?

A. Yes. It is up there near the airport.

Q. Did you go on to Clementyard, after you got back into the caboose?

A. Yes, sir.

Q. And about how far did this emergency braking incident occur and your injury occur, from where the Clement yards was?

A. Oh, it would be close to three miles.

Q. Now, you had with you bills that represented each freight car. Do you know whether or not you were supposed to make a stop at Clement yards?

A. Certainly. It was a regular place to set off cars and pick up cars.

Q. Was there any place where you were supposed to [fol. 27] stop in the vicinity of where this incident occurred?

A. No, sir.

Q. Now had you yet reached what is known as the Dayton yards?

A. We hadn't reached the Dayton yard office. We were in the yard limits.

Q. In the yard limits, but you hadn't yet reached the actual office?

A. No, sir.

Q. Is it at the office where you put out the bills and pick up the bills?

A. Yes, sir.

Q. Do you remember on this particular day whether you had bills to put out or not?

A. We had cars to set off and cars to pick up.

Q. Now that is at the Clement yards?

A. Yes, sir.

Q. Would you have put the bills off at the Dayton yards?

A. That was our instructions, we tossed the bills off at the Dayton yard office as we go by.

Q. And then did you stop at the Clement yards this particular day?

A. Yes, sir.

Q. Did you have occasion to talk to the engineer or anybody at that time and tell them about what happened to yourself?

A. Yes, sir.

Q. Virgil, will you describe what your physical condition was after this spill and on your ride back in to Columbus?

A. I was sore and aching and I can't hardly tell you. I was in a lot of misery.

Q. Can you describe what part of your body ached or was sore?

A. Well, my head and my back and my hip.

Q. Then after you went home that night, did you see a doctor some time or other?

A. I did.

Q. And what doctor did you go to?

A. Dr. Rusoff.

Q. Is that Maurice or M. B. Rusoff?

A. That's right.

Q. And is that here in Columbus?

A. Yes, sir.

Q. Do you know where his office was at that time?

A. It was right there on Buttles avenue; No. 9 I think [fol. 30] was his number.

Q. And did you live, generally speaking, up in that vicinity?

A. Very close.

Q. You were living on North High street then?

A. Right.

Q. Do you remember when, in relation to the day of the accident, you went to Dr. Rusoff?

A. Oh, right away, very early, as soon as I could get there.

Q. And will you describe what your physical condition was like some three or four days after this accident?

A. Well, I was a pretty bad beat up man and he was giving me medicine, giving me shots and what-not.

Q. Were your pains, generally speaking, in the same area that they had been?

A. Well, I was so bruised up I—truthfully, at the time I was so much injured I was sore all over.

Q. All right. Now then a week or two or three weeks after the accident, did you continue to have pain in the same general area?

A. Yes, sir.

Q. Was there pain in your back?

A. Yes, sir.

Q. And how did that affect you, Virgil?

A. Well, it's hard for me to try to tell it. I was sore and my leg would go out from under me. I don't know truthfully. In medical terms, I couldn't tell you.

[fol. 31] Q. I just want you to describe how it affected you.

A. It made me sick. I would be sick at my stomach; I was nervous.

Q. Were you able to walk in a normal manner?

A. Not without the assistance of a cane.

Q. Did you start using a cane?

A. Yes, sir.

Q. About how soon after the accident happened, do you recall?

A. Well, it was very soon, but I can't tell you in terms of hours.

Q. Was it in a matter of a week or two?

A. Oh, closer. My daughter went across the street there to a drug store and got me a cane.

Q. And then how long did you use a cane?

A. A long time, several months.

Q. Several months?

A. Yes, sir.

Q. How long did you continue to live in Columbus then, Virgil?

A. I left Columbus in September 1951, following the accident.

Q. Is that when you went back down to West Virginia?

A. Yes, sir.

Q. Now did you see Dr. Rusoff on more than one occasion?

A. Oh, he put me in the hospital and after I was discharged from the hospital he came to the house and I don't know how many—once a day or several days a week.

Q. And over how long a period of time did those treatments or visits from Dr. Rusoff continue?

[fol. 32] A. Up until I went down with my dad and mother, in September.

Q. Then after September, when next did you see Dr.

Q. Did you still have pain during the period of time you were going through that clinic?

A. Certainly did.

Q. Will you describe where your pain was?

A. It is in my lower back and on the right hip, down my right leg.

Q. When you say in your lower back would that be about in the area of where your belt is?

A. I don't know. It is along the belt line.

Q. Down in the vicinity of your belt line?

A. That's right.

[fol. 34] Q. Do you have any pains up higher, Virgil?

A. Well, I haven't for some time.

Q. Those pains are pretty well cleared up?

A. Yes, sir.

Q. Now how long, do you know, have you been free of those pains that were higher up in your back or neck or any place?

A. You know, I couldn't give you a date or anything on that. I am just glad they kind of eased up.

Q. Has it been several months, would you say?

A. Well, it eases up for a while and it comes back every now and then.

Q. It is less frequent now and less severe?

A. It is less frequent than it was to start.

Q. Now what about the pain? Do you still have pain in your low back area?

A. Yes, sir.

Q. And is that pain continuous or does it just come irregular?

Mr. Barton. We object to this form of leading questions.

The Court. Sustain the objection. Let the witness describe.

Q. Just tell us about how it affects you.

A. Well, it is pretty hard for me to try to bend, bend over to tie my shoe, and there is a feeling in there just like something got me, squeezing, or what-not.

Q. Is that a twenty-four-hour-a-day situation?

A. When it comes on, sometimes it lasts for longer than [fol. 35] that, and I can't sleep or do scarcely anything, but just have to sit down and try to stand up or get in position to get relief.

Q. Have you worked any on the railroad since this accident occurred in 1951?

A. I haven't worked anywhere.

Q. Do you personally know the amount of medical expense to Dr. Rusoff?

A. No, I wouldn't be exact, because a lot of times the man came over to the room and he would give me shots and give me medicine and I would pay him and I didn't get any receipt for it and sometimes, when I was able to get over to his office, I would pay.

Q. So you don't know the exact total of his bills?

A. No, I don't.

Q. Virgil, you spoke of being put in the hospital. Now can you tell me about when in reference to this accident that you were in a hospital?

A. Well, it wasn't very many days after the injury, but I can't tell you the correct date.

Q. What hospital were you in?

A. White Cross.

Q. As I understand it, you were in the hospital for a rectal condition?

A. Yes.

Q. And was it Dr. Rusoff that put you in the hospital?

A. He was the one recommended it, made the appointment and got the space for me.

[fol. 36] Q. Now, the condition that existed at that time you went to the hospital, had it ever existed before the accident took place?

A. No, sir.

Q. While you were riding in the caboose, at the time of the accident, in Dayton or before that, was there anything that you could do to control the movement of the train or the braking situation?

A. The engineer in the head end has control of that air.

Q. There are no levers, no nothing——

A. There is a conductor's valve, if it was necessary, or I had reasons to stop him, I could have blowed the air. But it was nothing touched; you know, unless we would have a broken journal or something like that would develop.

Q. When you speak of a broken journal, you mean the journal box?

A. Yes, the axle on the wheels.

Q. The end of the axle is called the journal box?

A. Yes.

Q. During all the time you worked on the railroad had this emergency braking situation—could you tell me about how many times you had ever been in a caboose when that situation arose?

A. Well, it is not a common occurrence. Now and then it happens, but the train line would happen to break or, you know, air hose would bust.

Q. Now, when you say not a common occurrence, it is common, a common knowledge though, isn't it?

A. Well, it is something that we know about.

Q. Is it something you can do anything about when you [fol. 37] are riding in the caboose?

A. No, sir.

Q. During all the times you worked on the Pennsylvania Railroad, from 1929 to 1951, do you have any idea how many times it ever happened, while you were in a caboose?

A. Oh, I don't—not very many times. Maybe three or four, five times, something like that. I don't know, not very many.

Q. Is there anything provided in the caboose, any kind of hand holds or anything that you can hold onto as you ride along in the caboose?

Mr. Barton: If your Honor please, we object to the leading questions here.

The Court: Yes. I will sustain the objection.

Q. When the train went into emergency brake situation, was there anything you could do to prevent being thrown?

A. No, sir.

Q. In addition to putting the train into an emergency braking situation, is there any other way you can slow down the speed of a train or stop it?

A. Yes. You can make a service application.

Q. Will you explain what a service application of the brake is?

A. Well, that is when the engineer would draw it off gently and let it come to a gradual, easy stop.

Q. And as you make a service application of the brake, does that brake then affect all the cars?

A. It will operate on all the cars that is in operating order.

[fol. 38] Q. I don't know whether I asked you: Do you know about what time of day this incident happened, Virgil?

A. It was near three o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. Still daylight?

A. Yes, sir.

Q. Virgil, before this incident occurred, will you describe what the condition of your back was?

A. Well, I was always a strong man, never had any trouble with my back at all.

Q. Had your back ever been injured before?

A. No, sir.

Q. Before the accident happened had you ever had pains in the back area like you had after the accident happened?

A. No, sir.

Q. Is there anything that affects your feeling or your symptoms?

A. There is something wrong, but I don't know what it is.

Q. Excuse me, if I don't make myself clear. I mean, is there anything in normal living—does lifting or weather or movement or anything affect your back?

A. It does now.

Q. What does?

A. Well, I can't stand to walk very much and I haven't tried lifting or anything like that.

[fol. 39] Q. Virgil, about how long did you use a cane to walk with?

A. Well, I couldn't tell you what month I quit using it. It was after I went to West Virginia.

Q. It was sometime after you went to West Virginia?

A. Yes, sir.

Q. That would have been after September of 1951?

A. Yes, sir.

Mr. McNamara: You may examine.

Cross Examination.

By Mr. Barton:

Q. Mr. Herdman, how old are you?

A. I was fifty years old November 20th.

Q. Are you a married man?

A. I am single.

Q. You referred a little while ago to your daughter. Had you been married?

A. Yes, sir.

Q. And were you divorced?

A. Yes, sir.

Q. And when were you divorced?

A. Well, it was in 1947. I couldn't tell you the exact date.

Q. That was prior to the time of this accident?

A. My wife left me while I was at work New Years Day, 1947, and the divorce came up a few months later and was granted her in Columbus.

Q. You were born and raised in the state of West Virginia?

[fol. 40] A. That is right.

Q. Is that down near where you are living now?

A. It is right on the same spot. The only difference, I was born in an old log cabin and they got a frame building now.

Q. And when did you come to Columbus to work for the Pennsylvania Railroad?

A. 1929.

Q. And did you work for the railroad then, except the times you were furloughed, until February 1, 1951?

A. Yes, sir.

Q. You were a conductor and as conductor you were in charge of this train, were you not?

A. Yes, sir.

Q. And how long had you been a conductor on the Pennsylvania System?

A. I think I was promoted to conductor in 1943.

Q. And then you had been performing the duties of conductor since 1943?

A. Yes, sir.

Q. And on a freight train such as you were working on at this time, the conductor usually rides in the caboose, does he not?

A. It is customary, yes.

Q. And you were riding in the customary place that you had been occupying other times that you had been working as conductor, were you not?

A. Yes, sir.

Q. Now, you had gone to Richmond on the day before this accident, which was January 31st—correct?

[fol. 41] A. Yes, sir.

Q. And what time did you report for duty then while in Richmond?

A. Well, I don't remember the exact time.

Q. Sometime in the morning?

A. The crew dispatchers call us. Sometimes we would be what was known as respite instead of going out on eight hours' rest. If they didn't have a train ready or what, they would set us back, what we call respite. I couldn't tell you about the limit on that day.

Q. Well, you mean recall the exact time, but would it refresh your memory to say that your time slip showed you reported at 5:10 a. m. that morning?

A. I would have to see the time slip before I would say that. I don't remember what time it was.

Q. You just don't remember what time you reported or what time you left Richmond?

A. I don't now, no.

Q. You may have left Richmond sometime fairly early in the morning, or middle of the morning, you just don't recall; is that correct?

A. Well, it wasn't to early in the morning. I wouldn't say the time because I don't remember.

Q. Well, you had been riding in the caboose, had you, from the time you left Richmond until you reached the outskirts of Dayton?

A. Yes, sir.

Q. And what kind of day was it, Mr. Herdman?

A. Oh, it was a cold winter day.

[fol. 42] Q. Very cold winter day and snow was blowing, wasn't it?

A. Blowing?

Q. Snow blowing off the houses and off the train, wasn't it?

A. Yes, sir.

Q. Well, now, as you came into the Dayton yard and as you approached the intersection where this emergency application of brakes was made, just what were you doing?

A. Sitting on a bunk.

Q. You were sitting on a bunk. You sure of that?

A. That is the best of my memory I was sitting on a bunk.

Q. And you couldn't have been standing up watching the air gauge?

A. I might have been attempting to get up, but I don't think I was.

Q. You don't think you were?

A. No.

A. In other words, you think you were sitting on a bunk when the application of brakes was made?

A. That is the best of my memory.

Q. Now, Mr. Herdman, as conductor of that train you were required to file a report, were you not, of any unusual occurrences that happened, any incidents that happened, or anything of that sort at that time?

A. Yes, sir.

Q. And that report was what is known as a CT 75 A?

A. Right.

Q. And did you make such a report in this case?

A. I did.

[fol. 43] Q. And you signed that report?

A. Yes, sir.

Q. And to whom was the report given?

A. To the train master.

Q. And when was the report made?

A. The following day.

Q. And of course, your recollection of what you were doing would have been much better the following day than it is today, wouldn't it?

A. Well, it was fresh in my memory at the time.

Q. And if you said in that CT 75 A report that at the time the stop was made you were standing up, looking at an air gauge, would that have been a correct statement at that time?

A. Well, it could or couldn't have been.

Mr. Barton: Mark this as Defendant's Exhibit A.

Thereupon the CT 75 A report was marked for identification as Defendant's Exhibit A.

Q. Mr. Herdman, I hand you what has been marked for the purposes of identification as Defendant's Exhibit A and I will ask you whether or not that is the CT 75 A report that you prepared and filed the day after this accident happened?

A. That doesn't look like my writing on part of it.

Q. Is that your signature there, Mr. Herdman, where it says, "Virgil Herdman, Conductor"?

A. Yes. I didn't notice that. It might be my handwriting.

Q. Will you read to the jury, please, what you say in that [fol. 44] report immediately above your signature?

A. (Reads) "CN 28, Engine 8800 moving east through Dayton with 67 cars at a speed of eight to ten mile per hour." Now this is what those guys told me. I can't see up there. I don't know. They say that an automobile drove——

Q. Just read what is on the report that you made.

A. (Continues to read) "To prevent striking automobile engineman applied air in emergency causing rough stop." This said I was standing in the caboose.

Q. Just read what it says.

A. I can't make that out.

Q. (Reads) "I was standing in caboose observing air gauge."

Mr. McNamara: We are willing, Mr. Barton read it, if the Court please, if the witness says he can't make it out.

The Witness: This is not my handwriting, Mac and some of that writing is a little bit hard for me.

Mr. McNamara: If it is not your handwriting, say it isn't; if it is, say it is.

The Witness: It is not.

Mr. McNamara: All right.

The Witness: Is that all you want me to read?

Q. You didn't finish reading. Do you want me to read it?

A. Some of those words in there are a little bit hard for me to say what they are intended for.

Q. I see. Now this statement says, and you follow me, [fol. 45] will you, and see if I read it correctly?

A. All right.

Q. (Reads) "CN 28, Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile engineman applied air in emergency causing rough stop. I was standing in cabin observing air gauge and when stop was made knocked me to floor of cabin bruising my hip." And that is your signature in that statement, is it not, Mr. Herdman?

A. That looks like my signature.

Q. If someone else wrote that, you read it before you signed it, didn't you, Mr. Herdman?

A. I was a pretty bruised up man and I don't remember if I did or not.

Q. You don't remember?

A. No. I usually wouldn't want to sign a blank but I trusted the train master and may have did it, I don't know.

Q. Isn't that the way this accident happened, the way that statement says?

A. The engineer told me that was the way he did it.

Q. And the train was going as you say in there at a slow rate of speed?

A. It wasn't going very fast. We didn't have a speedometer on the rear end to know about the speed, but you know, like we say, an estimated speed, it wasn't going very fast.

[fol. 46] Q. And the engineer told you that he applied the emergency brake to keep from hitting an automobile that come onto the track?

A. He told me that.

Mr. McNamara: I want to object to hearsay and what the engineer told this man is not subject matter for cross examination.

Mr. Barton: I think it is entirely proper on cross-examination.

Mr. McNamara: The engineer is available for testimony.

The Court. I will overrule the objection.

Mr. McNamara: Note exception.

Q. As a matter of fact, Mr. Herdman, in the deposition that Mr. Eckler took from you a few days ago, you told him that the engineer told you that there was a load of school children in an automobile and he stopped to avoid striking that automobile, didn't he?

Mr. McNamara: Objection.

A. The engineer told me that.

Q. Well, now, when Mr. McNamara was discussing with you the manner in which an air brake operated this morning, I think you said that you had been looking at the gauge at or shortly before anyway this accident happened and the air gauge was proper and in a normal position, was it not?

A. Well, it is a duty of a conductor to notice his air gauge.

Q. And you had noticed the air gauge before you went into Dayton or as you were going into Dayton?

A. Yes. We noticed it every now and then.

Q. Well, on this particular occasion you had noticed [fol. 47] the air gauge and noticed that it was proper, hadn't you?

A. Well, before we leave the yards, even after the air man o.k's it, we look for ourselves to know. Sometimes they will give a slip and the yard engine come down with a hot car or something and the yard crew will put another car on and the air man will fail to have the air in the rear end. So, that is the duty of a conductor or flagman to notice those gauges.

Q. I know that is your duty, but what I am asking you is, you did observe this air gauge shortly before this emergency stop took place, didn't you?

A. Well, I can't tell you just where or anything about it, but it was prior to leaving the yards and every now and then between.

Q. You recall when Mr. Eckler took your deposition the other day, don't you, Mr. Herdman?

A. Yes, sir.

Q. Do you recall him asking you this question: "Had you looked at that gauge before the accident?" Remember him asking you that?

A. I don't remember whether he asked me that or not.

Q. Do you remember answering: "Certainly. It was right up to standard." Do you remember answering that?

A. He asked so many questions. I can't remember all of them. I don't have no copy.

Q. Isn't it a fact now that the gauge was up to standard? There was no defect in air or gauge.

A. It had been up to standard.

Q. And it was the last time you looked at it immediately [fol. 48] or shortly before the accident, wasn't it?

A. Yes; it was afterwards.

Q. And it was afterwards. So, there was no defect in the gauge or braking equipment whatsoever of this train, so far as you know, was there?

A. No.

Q. None at all.

A. We didn't have no brakes sticking or anything like that.

Q. That's right. Now within what distance did this train stop after the emergency application of the brakes?

Mr. McNamara: If the witness has any knowledge.

The Court: Yes, if he knows.

Mr. Barton: If he knows.

A. At that speed you would go, oh, maybe somewhere, from three to five, six car lengths.

Q. And was this train on that occasion stopped within three to five to six car lengths?

A. I didn't measure it. I couldn't tell you.

Q. Don't you recall telling Mr. Eckler very definitely just last week that the train stopped from three to five car lengths?

A. I said it would be my judgment it was from three, maybe five or six car lengths.

Q. And that is your judgment now?

A. That's right.

Q. Now you stated, I believe, to Mr. McNamara, that in your experience as a conductor that you had been riding [fol. 49] in a caboose only about four times when the emergency application of brakes was made?

A. I said a few times, maybe three or four, or five times.

Q. Is that all—is that the only times that you have been

riding in a caboose when the emergency application of brakes was made?

A. I have rode in a caboose for years but those emergency stops are not a common occurrence.

Q. That is correct, they were not a common occurrence, but you have been in the cabin many more times than three or four, when the emergency application of brakes was applied, weren't you?

A. Not when we was moving.

Q. Do you ever apply an emergency application of brakes unless you are moving?

A. Well, some people do.

Q. On what occasion would you have to apply an emergency application of brakes, if you were standing still?

A. Wouldn't have any. If you are standing still and someone crosses your train and happens to pull that operating lever, it will lift the lock pin and then the engineer tries to start, the knuckles open up and the hose parts and puts it in emergency.

Q. Haven't you been riding with trains moving on many more occasions than three or four when an emergency application of brakes has been made?

Mr. McNamara: We will object to repetition of that question. It has been answered twice.

The Court: I don't believe he has answered it.

[fol. 50] Overrule the objection.

Mr. McNamara: I think you better read the question back.

(Thereupon the last Q. was read by the reporter.)

A. Well, we never keep a record on that and I wouldn't be exact. Not very many times while we was moving.

Q. Now again let me refer you, Mr. Herdman, to the deposition that was taken by Mr. Eckler on the 22nd day of December of 1953. Do you recall Mr. Eckler asking you this question: "Had you ever ridden in a caboose before when there was an emergency application of steam?" And your answer was: "Many times." Remember that?

A. You said steam.

Q. Yes.

A. That doesn't apply there, the air brakes.

Q. Then you weren't answering here when he——
A. You asked me about steam.
Q. Yes.
A. These brakes are controlled by air.
Q. What is an emergency application of steam?
A. I am not an engineer.
Q. Didn't you have reference here, when he asked you this question, to the emergency application of brakes and didn't you answer "Many times"?
A. I have known of it many times.
Q. His question was had you ever ridden in a caboose, and your answer was "Many times".
A. I had ridden in a caboose many times.
[fol. 51] Q. When there was an emergency application?
A. I know about many emergency applications that apply to the other fellows that I wasn't involved.
Q. Well, now, was there anything different in this application of the emergency brakes than any of the other emergencies that you had experienced?
A. All I know, it was very rough because I was involved.
Q. Well, didn't Mr. Eckler ask you this question: "Was there anything different between this time and the other times?" And wasn't your answer: "We just had no way to avoid it." Didn't you answer Mr. Eckler that way?
A. I don't remember about that answer.
Q. Well, let me show you.
A. Mentally we think of those things, but when it happens we can't do anything about it.
Q. Wasn't that your answer when he asked you "Was there anything different between this time and the other times?" And wasn't your answer: "We just had no way to avoid it"? Wasn't that your answer?
A. We don't have a way of avoiding it.
Q. Wasn't that your answer?
A. I didn't have a way to avoid it. We can think about it but nothing we can do about it. We were just like a man in a ship out there in the middle of the ocean. You may think about it sinking. If it is going to sink, you are going to get wet.
Q. On those other occasions, Mr. Herdman, when there
[fol. 52] had been an emergency application of brakes, had

you received any warning prior to the emergency application?

A. Repeat that, please.

Mr. Barton: Would you read the question?

(Thereupon the last Q. was read by the reporter.)

A. There was no way to receive a warning.

Q. That is right. There is no way to receive a warning when you are in the caboose and the engineer has to instantly put on an emergency application of brakes, is there?

A. It happens instantly.

Q. That is right, it happens instantly. Mr. Eckler asked you at that time "Now on these prior times you had emergency stops, had you been warned?" And your answer that time was "No, sir. You must expect that." Now that is right.

A. We have no way of being warned.

Q. And he asked you: "You didn't expect a warning?" And your answer was "I say, we had to expect it at all times." Now that is right.

A. We can think about it but nothing we can do about it.

Q. And he asked you, "You have to expect an emergency stop?" And your answer: "That's right." Isn't that true?

A. Any time a train line breaks or air hose busts or something like that, it will go in emergency.

Q. And you have to expect also, Mr. Herdman, that when an engineer is confronted with an emergency such as he was in this case, that there might be an emergency application of brakes, don't you?

[fol. 53] Mr. McNamara: We will object to that. It is asking him to suppose what he thinks about what an engineer might do.

The Court: I will overrule the objection.

A. We got to expect them or think about them.

Q. That's right. What time of day was it that this accident occurred, Mr. Herdman?

A. I told you a while ago it was a cold winter day.

Q. What time of day?

A. It was near three o'clock. I wouldn't be exact about the minutes. It was near three o'clock.

Mr. Barton: I think that is all.

Redirect Examination.

By Mr. McNamara:

Q. When you speak of being in charge of the train, you are not in charge of the locomotive and its engineer?

A. No. You are in charge of the train up to the tender and the bills.

Q. It does not include being in charge of the operation of the locomotive?

A. No. The engineer has control of that.

Q. Now he asked you if it was your duty to make a report. As I understand, it is the duty of the conductor to make such reports.

A. Right.

Q. It is not the duty of the engineer or anybody else, is it?

A. I never questioned the engineer about what he is supposed to do, but it is the duty of a conductor to make them. [fol. 54] Q. And this report here that Mr. Barton has, what happened up in front is what somebody told you; is that correct?

A. Right.

Q. You were not in a position to know?

A. I couldn't see the front end.

Q. Virgil, I notice that the date up here is blank. It doesn't show what date, month or anything this report was made, does it?

A. It doesn't. I don't see it.

Q. As I understand it, part of the time after the spill you were on the floor; is that correct?

A. Yes, sir.

Q. And being on the floor, you have no idea, no way of judging the distance you traveled?

A. No. It would be hard to say.

Q. And you have no way of knowing when anybody filled out that report have you, since it doesn't have a date on it?

A. No. I see a date they got stamped on there, December 1953. But this happened on February 1, 1951.

Mr. McNamara: Right. I think that is all.

Recross Examination.

By Mr. Barton:

Q. Now, Mr. Herdman, there is a date on this report, is there not?

A. I see a stamped date down there at the bottom, but I don't see one up at the top.

Q. Isn't on this report the date of the accident 2/1/51, [fol. 55] which is February 1, 1951, at 3:28 p. m." Isn't that on this report?

A. Yes, but that report wasn't made on February 1st.

Q. Well, no. You said you made the report the next day.

A. It happened on February 1st.

Q. That is right. Isn't that what that says, "The date of the accident February 1, 1951; time of day, 3:28 p. m." Isn't that on that report?

A. That is there, but I looked here where it says February, and it didn't say the date or the year.

Q. That says, "Report for the month of February", doesn't it, Mr. Herdman, the official report that you made after this accident occurred as conductor in charge of this train?

A. We was required to do that and I did it to the best of my ability.

Q. And if some of the information here is information that had been given to you by other members of the crew, it was the information that was given to you immediately or shortly after the accident, wasn't it?

A. Yes, sir. I haven't seen any of the crew since we completed our run.

Mr. Barton: That is all.

Re-redirect Examination.

By Mr. McNamara:

Q. Can you state definitely, yes or no, whether or not that is your handwriting on the report?

A. It looks like my signature, Mac.

Q. But the report that is made out above that signature?

A. It is not my handwriting.

[fol. 56] Mr. McNamara: That is all.

Re-recross Examination.

By Mr. Barton:

Q. But you didn't sign a blank report, did you, Mr. Herdman?

A. I was suffering pretty much. I don't remember what I might have done.

Q. As the conductor, though, in charge of this train and required to make a report, you wouldn't sign a blank report, would you?

A. My knowledge would teach me not to, but I might have.

Mr. Barton: You might have. All right. That is all.

By Mr. McNamara:

Q. It is also possible somebody else filled out the report and handed it to you to sign?

A. That was the way it happened, but I could have. I don't remember if I read it or not, but I ordinarily wouldn't sign something without reading it.

Mr. McNamara: That is all.

Mr. Barton: That is all, Mr. Herdman.

The Court: That is all.

Afternoon Session

Monday, January 25, 1954.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the following proceedings were had:

[fol. 57] Court's Statement

The Court: Ladies and Gentlemen of the Jury, I think some of you may know or have heard me express in the past, in the last two or three weeks, that the duty of the Court is to pass upon questions of law, and I have told you, and the duty of the jury is to pass upon questions of fact, and these questions of law arise at various stages of the case, and very frequently at the conclusion of the plaintiff's case a question of law arises which presents

a question as to the sufficiency of the plaintiff's case; that is, if we assume that everything that has been submitted in the plaintiff's case is true, would that be enough to warrant a verdict in his favor, or would it make a case legally? And such a motion has been raised in this case and when such a question of law is raised, it is necessary for the judge to decide that question.

So, in this case I have decided that question and have decided that I would be compelled to sustain the motion of the defendant for a directed verdict, and so in due time, I will request that you sign a verdict for the defendant in accordance with my instructions. But first I shall try to explain to you what this question is and why I decide it as I do.

This is a case in which the testimony, as you have observed, is only the testimony of the plaintiff, who was in the caboose at the time this train stopped and has no knowledge of what happened, other than he knows that an emergency stop was made.

There is a doctrine of the law known as *res ipsa loquitur*, which means, in ordinary language, the thing speaks for itself, and the effect of that is that in certain kinds of accidents and under certain circumstances all the plaintiff has to do is to show that an accident happened under such [fol. 58] circumstances that it would not ordinarily happen and then that raises an inference of negligence, and when such a situation arises and there is an inference of negligence, then the plaintiff is entitled to have the case presented to the jury and to have the defendant's explanation and have the jury then to decide the question.

Whether or not a case is one to which the doctrine of *res ipsa loquitur* applies is a question of law for the judge to decide. So, I have decided in this case that this is not the sort of accident or situation in which the doctrine of *res ipsa loquitur* applies. In order for it to be such a case, it would have to be a situation, a set of facts where the accident happened is something that would not happen in the ordinary course of events. In this case, it would have to be that an emergency stop would not happen in the ordinary course of operating a railroad.

The plaintiff has testified in this case that he has been in a caboose some five, six or seven times, at least when an

emergency stop was made and that you always have to expect an emergency stop to be made, and that there isn't anything that you can do about it.

Obviously, when an emergency stop has to be made, the very nature of the emergency is that it is done immediately and in a freight train no opportunity for warning, as the plaintiff has testified to.

Now, for the plaintiff to recover against the defendant in this case, he must show negligence against the defendant; that is, he must show that he was injured through the negligence of the defendant acting through some of its employees. I think, as may have been said to you on your *voir dire* examination, that this is not a situation like we [fol. 59] have in Ohio, under the Workman's Compensation Law, where all a person has to do is to show that he was injured while in the performance of his duties. This case comes under a federal law, that is, a law passed by the Congress of the United States, and its only provision is that an employee who is injured may recover against the defendant for the negligence of the defendant. And so, the Court comes to the conclusion that this is not the sort of case where negligence may be inferred and there is no proof of negligence.

The plaintiff claims first that the defendant failed to provide plaintiff with a reasonably safe place to work. But there is no evidence that this caboose was any different than any other caboose, or that if it had been different this accident would not have happened. And then he also claims that the defendant failed to warn the plaintiff of the emergency stop. But as he himself has testified, it is impossible for the engineer or fireman to warn him of an emergency stop.

And his second charge is that the operator of the train operated the train so as to throw it into emergency stop causing the plaintiff to be thrown from one end of the caboose to the other. There is no evidence of that and if the evidence were to develop in this case that the engineer did make an emergency stop and that he was in the exercise of ordinary care in making that emergency stop, then the defendant would be entitled to recover a verdict. In other words, it is perfectly proper and legal to make an emergency stop when, as and if it is necessary.

Now, as I say, I have decided this question of law and disposed of this case by a decision on a question of law, and that is the Court's responsibility; that is, I assume full responsibility for this decision. If this case is ap-
[fol. 60] pealed, the decision that is appealed is my decision and it is my full responsibility. Under the law there is no other way to carry out that provision of the law, except to ask the jurors, or, rather, to direct the jurors to sign a verdict for the defendant.

You may or may not have reached this conclusion if you had heard all of the evidence in the case, but you have taken an oath to decide this case according to the law and the evidence, and this is a situation where you must determine it entirely on the law as directed by the judge; and I too, have an oath to perform my duties, and it is as much incumbent upon me to carry out my duty to direct a verdict, if that is what is indicated, as it is to let the case go to the jury, when that is indicated.

So, we are here under oath to perform our duties and at this time I request that you sign this verdict for the defendant. The clerk will pass it around.

Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 61-62] IN UNITED STATES DISTRICT COURT

DIRECTION TO ENTER JUDGMENT—Filed January 25, 1954

To the Clerk:

Enter judgment in the above-entitled case. On verdict for Defendant.

(S.) Lester L. Cecil, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING MOTION FOR NEW TRIAL—December 17, 1954

Plaintiff's motion for a new trial is overruled. Exceptions to plaintiff.

(S.) Lester L. Cecil, Judge.

Approved: (S.) Kenneth Agee, Attorney for Plaintiff.
(S.) Robert L. Barton, Attorney for Defendant.

[fol. 63]

Proceedings in the United States Court of Appeals For the Sixth Circuit

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[fol. 64] CAUSE ARGUED AND SUBMITTED—December 3, 1955
Before Simons, Chief Judge, McAllister and Stewart, Circuit Judges

This cause is argued by Donald S. McNamara for appellant and by John Eckler for appellee and is submitted to the court.

JUDGMENT—Filed December 13, 1955

Appellant is a freight conductor employed by the appellee railroad company. He brought this action under the Federal Employers' Liability Act for injuries he received while riding in the caboose of a freight train in the course of his employment. This appeal is from the judgment of the district court entered upon a directed verdict for the appellee railroad.

The appellant himself was his only witness at the trial. He testified that his injuries were received when he was thrown to the floor of the caboose by an emergency stop made by the train at a time when it was proceeding at a speed of from eight to ten miles an hour. An official re-

port signed by him after the accident stated that the emergency stop had been made to avoid striking an automobile at a grade crossing.

We think the district judge correctly performed his duty in directing a verdict for the appellee. There was "a complete absence of probative facts to support the conclusion" of negligence. *Lavender* v. *Kurn*, 327 U. S. 645 (1946). And negligence remains the sole basis of liability under the Federal Employers' Liability Act. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943).

The judgment is affirmed.

[fol. 65] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed April 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
MAR 12 1956
HAROLD B. WILLEY, Clerk

No. 747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY.

Respondent.

PETITION FOR WRIT OF CERTIORARI.

J. PAUL MCNAMARA,
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Attorney for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

VIRGIL HERDMAN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

OPINION BY COURT BELOW.

Petitioner, Virgil Herdman, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment and decision of that court in case number 12431 entitled Virgil Herdman v. Pennsylvania Railroad Company, opinion dated December 13, 1955 (R., 63a).

The judgment of the Court of Appeals sustained the judgment of the Federal District Court. The District Court directed the jury to return a verdict for the respondent on the motion of the respondent at the close of petitioner's evidence, and rendered judgment on that verdict.

JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought was dated and filed December 13, 1955 (R., 63a).

Jurisdiction to review that judgment by writ of certiorari is conferred on this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat., 928, U. S. C., Title 28, Section 1254(1), which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * * * * * * * * * *"

QUESTION PRESENTED FOR REVIEW.

In an action under the Federal Employer's Liability Act where the uncontroverted evidence shows that petitioner was a conductor in the employ of respondent riding in the caboose of respondent's freight train and that while the train was under the exclusive control of the respondent, moving within the respondent's yard limits, it was brought to a sudden and unexpected stop without warning or notice of any kind to petitioner and at a place where the train did not ordinarily stop and petitioner was thrown against a table and onto the floor sustaining severe personal injuries, was the District Court in error in refusing to submit the case to the jury on a permissible inference of respondent's negligence under res ipsa loquitur?

STATUTES INVOLVED.

The question presented for review in this case involves two statutes passed by Congress. The pertinent statutes in the Federal Employer's Liability Act involved in this appeal are Sections 51 and 54 of Title 45, U. S. C.

Section 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Section 54 provides:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the United States District Court for the Southern District of Ohio. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employer's Liability Act (Title 45, U. S. C., Sections 51 and following) were, therefore, invoked.

At the trial only two witnesses were presented: the plaintiff and his physician. The uncontroverted evidence was that the petitioner was a man past 50 years of age, presently residing near Leon, West Virginia. He hired out to the respondent railroad in 1929 and remained with it until he was injured in 1951 (R., 8a). On February 1, 1951, the date of his injuries, petitioner was performing his regular duties as a freight conductor on the Richmond, Indiana to Columbus, Ohio run. He and the flagman rode in the caboose of the train which consisted of a steam locomotive, a diesel engine, 60 some freight cars and the caboose (R., 15a). The train, as far as operation was

concerned, was within the exclusive control of the respondent's engineers (R., 53a). Petitioner did not exercise any control over what happened in the locomotive or engine.

While passing through the respondent's yard limits in the city of Dayton, Ohio, the movement of the train came to a sudden stop about two miles before the place where it was scheduled to stop and petitioner was thrown violently against a table and then to the floor with the flagman landing on top of him. The petitioner described, as best he could, what happened:

> "Well, we were coming through there at a slow like speed and I don't know what went wrong, the train went in emergency and threw me into this table and tore it up and I was upon the floor with my flagman on top of me, when we finally got straightened up." (R., 17a).

The petitioner told how, after he got up, he made an investigation and concluded that someone (probably the engineer) in the engine had made a sudden application of the air brakes (R., 23a). He testified that the train was not scheduled to stop in the vicinity of where this accident took place, although they were within the Dayton yard limits (R., 27a). During the 22 years plaintiff had been with the railroad, he had been riding only 3 or 4 or 5 times when the train was brought to a sudden stop when a train line would break or air hose bust. Never had it been as disastrous as this time.

Petitioner further testified that when the train went into this sudden stop he had no warning and there was nothing he could do to protect himself. Near the end of his testimony the following questions and answers appear (R., 37a):

> "Q. In addition to puting the train in an emergency braking situation, is there any other way you can slow

down the speed of a train or stop it? A. Yes, you can make a service application.

Q. Will you explain what a service application of the brake is? A. Well, that is when the engineer would draw it off gently and let it come to a gradual, easy stop."

Petitioner and his attending physician testified to the nature and extent of the injuries which resulted. Since that is not involved in this appeal we will not go into detail except to observe that plaintiff did receive permanent and disabling injuries, and he has been unable to work since the date of this occurrence.

On cross examination the petitioner testified that subsequent to his injuries the engineer admitted that he had made a sudden application of the brakes, and petitioner so reported the occurrence to the train master in Columbus. Based on this conversation with the engineer, petitioner, at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent. The contents of that report are as follows (R. 45a):

> "CN 28, Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile engineman applied air in emergency causing rough stop. I was standing in cabin observing air gauge and when stop was made knocked me to floor of cabin bruising my hip."

The petitioner further testified that he had no personal knowledge of why the train was suddenly stopped.

On motion of the respondent the trial judge directed the jury to return a verdict for the respondent and the court entered judgment thereon on January 25, 1954. Petitioner's

motion for new trial was filed on February 2, 1954 and overruled on December 17, 1954.

On appeal of the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the basis that:

> "There was a complete absence of probative facts to support the conclusion of negligence. Lavender v. Kurn, 327 U. S., 645 (1946). And negligence remains the sole basis of liability under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S., 54 (1943)."

SUMMARY OF ARGUMENT.

This is an action arising under the Federal Employer's Liability Act (Title 45, U. S. C., Sections 51 and following), but the issues transcend that Act.

The basis for the opinion of the Court of Appeals is not clear. Three interpretations of this opinion are possible:

(1) If the court is saying that the doctrine of res ipsa loquitur is not applicable to actions brought under and by virtue of the Federal Employer's Liability Act, the ruling abolishes rights granted employees and the ruling is contrary to numerous decisions of the United States Supreme Court and other United States Courts of Appeals.

(2) If the court is saying that there was not sufficient evidence to permit the application of the doctrine of res ipsa loquitur and submit the case to the jury then the Circuit Court has placed an almost impossible burden of producing evidence upon the plaintiff and has reversed a former decision of the same court and established a direct conflict of authority between Circuit Courts and between this Circuit Court and several state courts.

(3) If the court is saying that the inference of negligence authorizing application of the doctrine of res ipsa loquitur has been rebutted as a matter of law, the court has substituted itself for the jury to determine whether an inference of fact had been rebutted contrary to principles announced by the Supreme Court of the United States.

The practical effect of the holding of the Circuit Court, if permitted to stand, will seriously erode, if not completely wipe out, the principle of res ipsa loquitur in the Sixth Circuit. This error on res ipsa loquitur reaches beyond actions by railroaders. It involves a misconception of

the respective functions of judge and jury. This error alone furnishes ample reason to grant certiorari and to review and reverse the decisions of the Court of Appeals for the Sixth Circuit and the District Court.

In addition, this decision is in conflict with decisions in other federal circuits and state courts.

ARGUMENT.

This court has defined res ipsa loquitur and set forth the elements necessary for its application in *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89 (1912). At pages 98 and 99 the court held:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

In *Nashville, C. & St. L. Ry. Co. v. York*, 127 F(2) 606 (6 C. C. A., 1942), it was stated:

> "The highest court has made it clear that while the res ipsa loquitur doctrine does not compel an inference of negligence from the facts of an occurrence, it does warrant such inference; that the facts of an occurrence furnish circumstantial evidence of negligence where direct evidence of the same may be lacking; that the evidence must be weighed, but not necessarily accepted as sufficient; that explanation or rebuttal is called for, though not necessarily required; that a case for the jury is made, though the jury's verdict is not forestalled; that the defendant's general issue is not converted into an affirmative defense; and that 'when all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.' Sweeney v. Erving, 228 U. S., 233, 240, 33 S. Ct. 416, 418, 576 Ed. 815."

The accident need not be explicable only in terms of negligence to invoke res ipsa loquitur, *Johnson v. United States*, 33 U. S., 46, 49 (1948).

This court has held that the doctrine of res ipsa loquitur is applicable to actions arising under the Federal Em-

ployer's Liability Act. *Jesionowski v. Boston & Maine Railroad*, 329 U. S., 452 (1947).

There can be no doubt that under this Act (Title 45, U. S. C. Sections 51 et seq.) a positive duty was placed upon the respondent to exercise due care for the safety of its employee, the petitioner, during the course of his employment. This is a continuing duty. *Bailey v. Central Vermont Railway, Inc.*, 319 U. S., 350 (1943); *United States Railroad Administration v. Monahan*, 79 2nd App., 309, 137 N. E., 778 (1923).

The petitioner has not assumed the risk of negligence by the respondent in suddenly stopping a train. Title 45, Sec. 54, U. S. C.; *Devine v. Chicago R. I. & P. Ry. Co.*, 226 Ill., 248, 107 N. E., 595 (1914), affd. 239 U. S., 52 (1915).

It is manifest that the respondent had exclusive control over the "thing which causes injury", the train. Such control was exercised by the engineer and other employees of respondent in the engine. The petitioner, riding in the caboose had no control over the train, and his injuries were completely without his fault.

The sudden stopping and the resultant injuries to the petitioner were not "such as in the ordinary course of things" occur when the one having control of the train uses proper care. It is common knowledge that a train can and should be stopped without causing a person riding in the caboose to be violently thrown against a table, damaging the table, and then onto the floor with another person landing on top of him. The petitioner testified that a "service application" of the brakes could have been made bringing the train to a smooth stop. Anyone who has ever ridden in a train knows this and can envision the danger of a sudden, unexpected stop to passengers and employees on board. If accidents such as this were the common thing to

be anticipated, surely we would all seek safer means of transportation.

Certainly, in the words of the Supreme Court in *San Juan Light Company v. Requena*, 224 U. S., 89, 99:

> " * * * the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, (and) it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

Similar situations have been before the Federal Courts before, and on similar evidence the courts have held that res ipsa loquitur was applicable and the burden of going forward with the evidence was upon the defendant. The case of *Zumwalt v. Gardner*, 160 F. (2), 298 (8 CCA, 1947) is directly in point.

The plaintiff alleged that he was a switchman, employed by the defendant. While attempting to board a switch engine, "it suddenly, unexpectedly, and with an unusual and violent jerk threw and knocked him from the footboard of the engine," causing him to fall and be run over by the engine. He alleged that the action of the engine was caused by (1) the engineer negligently applying the emergency brakes or (2) defects in the braking system causing the brakes to be set in emergency without fault of the engineer. At trial the engineer, called by the plaintiff, denied applying the emergency brake. *There was no evidence to contradict him.* The trial court withdrew the first alleged ground of negligence from the jury but submitted the second. On appeal, the Circuit Court of Appeals held that the trial court erred in withdrawing the first alleged ground of negligence from the jury. At page 302, the Appellate Court held:

> "* * * The sudden stopping of the engine resulting in jarring plaintiff from the footboard was, we think, circumstantial evidence of negligence because the en-

gine was under the exclusive control and management of the defendant and the accident in the ordinary course of events would not have occurred if proper care had been observed."

In *Chesapeake & Ohio Ry. Co. v. Smith*, 42 F. (2), 111, (6 CCA, 1930), the plaintiff, employee, was riding in the caboose when the train of 98 cars stopped so suddenly he was thrown out through the open vestibule. After the accident a break in the train line was found only twenty cars from the caboose. The plaintiff, himself an experienced brakeman, testified that a break in the train line only twenty cars from the caboose would make a "reasonable stop on the rear end," and that "an emergency application" of the brakes by the engineer was the only thing that could have caused the severe jolt. At page 114 this court held:

> "* * * On this assumption that the break was caused by the sudden application of the brakes by the engineer, plaintiff's evidence, in our judgment, sufficed to make applicable the rule of res ipsa loquitur as developed in the cited cases * * *"

Several state court decisions are also worthy of attention. In *Missouri Pac. R. Co. v. Montgomery*, 186 Ark., 537, 55 S. W. (2), 68 (1933), cert. den. 289 U. S., 747 (1933), the plaintiff was a brakeman riding in the caboose. The train suddenly and unexpectedly stopped, and plaintiff was thrown against a desk, sustaining severe injuries. The plaintiff testified that he believed the sudden stop was due to improper application of the air by the engineer. The engineer denied that he applied the brakes. The Supreme Court of Arkansas held that res ipsa loquitur was applicable and a jury issue was presented. The court observed:

> "It would of course have been impossible for the appellee (plaintiff) to have known of the existence of

the negligence of the engineer because he was in the caboose sitting and could not have seen any evidence of the negligence before his injury."

Other state court decisions in which the doctrine of res ipsa loquitur has been applied to enable an injured railroader to recover damages due to the negligence of the railroad in suddenly stopping its train include:

Castonia v. Main Cent. R., 78 N. H., 348, 100 A., 601, (1917);

Lamb v. Atlantic Coast Line R. Co., 179 N. C., 619, 103 S. E., 440 (1920);

Ft. Worth & D. C. Ry. Co. v. Stalcup (Tex.), 167 S. W., 279 (1914).

Among the passenger cases which are worthy of attention is *Southern Pac. Co. v. Hanlon*, 9 F(2), 294 (9 CCA, 1925). The plaintiff was thrown to the floor by reason of the sudden stopping of the train, brought about by an emergency application of the brakes. The answer denied any negligence in so stopping and averred that the train was stopped to save the life of a trespasser who had missed his footing in attempting to board the train. The Court of Appeals held that this was clearly a res ipsa loquitur situation and that a jury question was presented as to whether the defendant had justified its act.

See also *McQuin v. Santa Fe Trail Transp. Co. et al*, 155 Kans., 111, 122 P. (2), 787 (1942) and *Delaware Coach Co. v. Reynolds*, 45 Del., 226, 71 A. (2), 69 (1950)."

Analogous to the instant case is the situation in which a train is derailed and the railroad claims it was due to the fault of a third person.

In *Fink v. New York Cent. R. Co.*, 144 Ohio St., 1, 56 N. E. (2), 456 (1944), the Supreme Court of Ohio held that res ipsa loquitur was applicable where the plaintiff, a

United States Government mail clerk, proved that the mail car in which he was riding was derailed and that he was injured as a result. Defendant offered evidence that an automobile without lights, had been overturned on the tracks prior to the collision through no fault of the defendant and that the collision and consequent derailment could not have been avoided by defendant's employees. The trial court's refusal to charge on res ipsa loquitur and a verdict and judgment for defendant were reversed and remanded by the Supreme Court. On page 5 of its exhaustive opinion the court observed:

> "The particular justice of the doctrine rests upon the foundation that the true cause of the occurrence whether innocent or culpable is within the knowledge or access of the defendant and not within the knowledge or access of the plaintiff."

Under the Federal Employer's Liability Act, it frequently has been applied where railroad employees have been injured when the train on which they were riding was derailed. *Jesionowski v. Boston & Maine R. R. Co.*, 329 U. S., 452 (1947); *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2), 55 (8 CCA, 1947); *Nashville, C. & St. L. Ry. Co. v. York*, 127 F. (2), 606 (6 CCA, 1942); *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. (2), 271 (8 CCA, 1941), cert. den. 314 U. S., 680 (1941); *Lowery v. Hocking Valley Ry. Co.*, 60 F. (2), 78 (6 CCA, 1932).

Res ipsa loquitur has also been applied where a railroader was injured due to the sudden starting of a train. *Moore v. Grand Trunk Ry. Co.*, 93 Vt., 383 (1919), 108 A., 334; *Raze v. St. Louis, S. W. R. Co.*, 360 Mo., 222, 227 S. W. (2), 687 (1950).

The essential elements of res ipsa loquitur have been shown: the respondent owed to the petitioner a duty to exercise care in accordance with the dangers of the situa-

tion; the respondent had exclusive and complete control over its tracks and yard limits; the petitioner was entirely without fault; and the injuries were not such as in the ordinary course of things occurs if the respondent had used proper care. A jury issue was presented. The courts have so held in cases almost identical in their essential facts with this case as well as in analogous cases. A conflict has arisen between the circuits, and this conflict should be determined.

The United States Supreme Court has jealously guarded the worker's right to have his case submitted to the jury. *Wilkerson v. McCarthy*, 336 U. S., 53 (1949). And it cannot be contended that a jury finding for the plaintiff in this action would be mere speculation or conjecture, and the trial court's action defended on that ground.

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."
>
> *Lavender v. Kurn*, 327 U. S., 645, 653 (1946).

The Court of Appeals for the Eighth Circuit recently expressed the law which should have been applied in this case:

> "Only where the defendant's evidence of explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case. * * * And these in cases under the Federal Employer's Liability Act will be situations of the 'rarest exceptions' * * *."
>
> *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2), 55, 60 (8 CCA, 1947)."

CONCLUSION.

The Court of Appeals for the Sixth Circuit has committed serious error in its decision on res ipsa loquitur. The practical effect of that holding is to wipe out the doctrine in the Sixth Circuit.

In view of this error and the conflict between the circuits this court should grant writ of certiorari to review the decision of the Court of Appeals.

The judgments of the District Court and Circuit Court of Appeals should be reversed and petitioner should be granted a new trial.

Respectfully submitted,

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Reply Brief in Support of Petition for Writ of Certiorari.

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No. 747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

Because of several statements in the respondent's brief, which might tend to mislead the court, petitioner feels constrained to submit this reply brief.

Respondent would have the court believe that there is evidence in the record that the train on which petitioner was riding at the time he sustained his injuries was brought to a stop because of an emergency: an automobile cross-

ing respondent's tracks. Such is not in evidence. The only evidence is that the engineer of respondent's train told petitioner subsequent to the occurrence that this was why he brought the train to such a sudden and disastrous stop.

Respondent omits the fact that there existed a continuing duty on the part of its engineer to exercise due care for the safety of the petitioner. Respondent omits the fact that this was an affirmative duty imposed by federal law, one which could not be discarded regardless of the circumstances.

Can the court possibly conceive of an employee in the caboose of a train having personal knowledge as to why the engineer makes a sudden application of the brakes of the locomotive sixty-eight cars ahead?

ARGUMENT.

Under section IIA of respondent's argument it is stated:

> "The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law."

It is just such misleading statements of law which have resulted in this petition. Petitioner does not argue that the engineer and his master should be *presumed* to be negligent, even under the facts of this case.

Because of the sudden stop of this train within the respondent's yard limits, petitioner submits that an *inference* of respondent's negligence may be drawn. This principal is clearly supported by *Zumwalt v. Gardner,* 160 F. (2), 298 (8 CCA, 1947) and *Chesapeake & Ohio Ry. Co. v. Smith,* 42 F. (2), 111 (6 CCA, 1930) and other cases cited in petitioner's brief which are not distinguished in respondent's brief.

> "While the words presumption and inference are often confused, nevertheless there is a clear and definite distinction between them." *Fink v. N. Y. C. Rd. Co.,* 144 Ohio State, 1, 6 (1944).

Section IIB of respondent's brief states:

> "The accident must have happened under circumstances which leave no reasonable conclusion other than negligence of defendant."

In support of that proposition respondent cites two cases. *This is not the law as expressed by this court.*

In *Johnson v. United States,* 333 U. S. 46 (1947) Mr. Justice Douglas stated the law at page 48:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked."

Such erroneous concepts of the law only serve to make it more imperative that this court grant a writ of certiorari in this case and firmly settle the law. It is obvious that unless this is done, res ipsa loquitur will be unduly restricted in the Sixth Circuit.

In Section IIC of respondent's brief it states:

> "The knowledge of how the occurrence happened must be peculiarly within the knowledge of the defendant."

Again, this is not the law.

Res ipsa loquitur has frequently been applied when it is apparent from the facts that the accident is a mysterious occurrence as to which the defendant knows no more than the plaintiff. See *Hiell v. The Golco Oil Co.*, 137 Ohio State, 180, 28 N. E. (2), 561 (1940). Res ipsa loquitur has even been applied when the defendant is dead. In *Weller v. Worstall*, 50 Ohio App., 11 (1934), it is stated on page 17:

> "As a last contention it is claimed that the doctrine can not be invoked against one who died as a result of the rule lies in the fact that the cause of injury is usually known by the defendant and unknown to the plaintiff, and that when the reason for the rule fails the rule becomes inoperative. In other words the management and control of the automobile having been in the decedent, and he being dead, he can not now speak the true cause of the accident. That theory may be one of the reasons for the rule, but it is not the basic cause for its adoption."

As stated on page 302 of *Prosser on Torts*:

> "If the circumstances are such as to create a reasonable inference of negligence, it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what had happened."

In any event it is clear that the petitioner had no knowledge of why the train was brought to a sudden stop. The only person having such knowledge must have been the person who brought it to such a stop. Whoever that was respondent should have presented him as a witness.

All evidence as to why defendant's engineer stopped the train was hearsay to the plaintiff and was injected into the trial by defendant on cross examination, who submitted a report that had been prepared by one other than plaintiff and submitted to plaintiff only for signature.

SUMMARY.

The respondent has failed to justify any distinction between the cases relied upon by petitioner and the instant case. It is clear that a conflict of authorities exists between the circuits and between the Sixth Circuit and several state courts.

It is also apparent that the judgment in the instant case was based upon an erroneous concept of the law as regards res ipsa loquitur. If this misconception is allowed to stand unaltered it will result in serious erosion of the doctrine in the Sixth Circuit.

If the instant case is allowed to stand unaltered the ruling of this court in *O'Neill v. The Baltimore & Ohio Railroad Company*, 348 U. S., 956 (1954), will be effectively reversed, for the *O'Neill* case holds that the court cannot substitute itself for the jury in determining issues of fact —in that case, as in this—whether the inference of negligence has been rebutted.

CONCLUSION.

In view of the serious errors committed by the courts below, certiorari should be granted and the judgment reversed. Petitioner should be granted a new trial.

Respectfully submitted,

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No. 46.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

On Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF OF PETITIONER ON MERITS.

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VIRGIL HERDMAN,

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PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF OF PETITIONER ON MERITS.

I.

OPINION OF THE COURT BELOW.

On December 13, 1955, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Southern District of Ohio, and rendered final judgment for the respondent (R., 44, 45). The opinion of the Circuit Court is reported in 228 F. (2), 902. The District Court directed the jury to return a verdict for the respondent on the motion of the respondent at the close of petitioner's evidence (R., 40-43) and rendered judgment on that verdict (R., 43).

II.

JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit under review was dated and filed December 13, 1955 (R., 44, 45).

This court granted certiorari on April 23, 1956 (R., 45).

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred upon this court by the provisions of the Act of June 25, 1948, C. 646, 62 Stat., 928; U. S. C., Title 28, Section 1254 (1), which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * * * * * * * * * *"

QUESTION PRESENTED FOR REVIEW.

In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that petitioner was a freight conductor in the employ of respondent riding in the caboose of respondent's freight train and that while the train was under the exclusive control of the respondent, moving within the respondent's yard limits, it was brought to a sudden and unexpected stop without warning or notice of any kind to petitioner and at a place where the train did not ordinarily stop and petitioner was thrown against a table and onto the floor sustaining severe personal injuries, was the District Court in error in refusing to submit the case to the jury on a permissible inference of respondent's negligence under res ipsa loquitur?

STATUTES INVOLVED.

The question presented for review in this case involves two statutes passed by Congress. The pertinent statutes in the Federal Employers' Liability Act involved in this appeal are Sections 51 and 54 of Title 45, U. S. C.

Section 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Section 54 provides:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the United States District Court for the Southern District of Ohio. Petitioner was an employee of respondent. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employer' Liability Act (Title 45, U. S. C., Sections 51 and following) were, therefore, invoked.

At the trial only two witnesses were presented: the plaintiff and his physician. The uncontroverted evidence was that the petitioner was a man past 50 years of age, presently residing near Leon, West Virginia. He hired out to the respondent railroad in 1929, and remained with it until he was injured in 1951 (R., 6). On February 1, 1951, the date of his injuries, petitioner was performing his regular duties as a freight conductor on the Richmond, Indiana to Columbus, Ohio run. He and the flagman rode in the caboose at the rear of the train which consisted of a steam locomotive, a diesel engine, 60 some freight cars and the caboose (R., 11). The train, as far as operation

was concerned, was within the exclusive control of the respondent's engineers (R., 38). Petitioner did not exercise any control over what happened in the locomotive or engine at the head of the train.

While passing through the respondent's yard limits in the city of Dayton, Ohio, the movement of the train came to a sudden stop about two miles before the place where it was scheduled to stop, and petitioner was thrown violently against a table and then to the floor with the flagman landing on top of him. The petitioner described, as best he could what happened:

> "Well, we were coming through there at a slow like speed and I don't know what went wrong, the train went in emergency and threw me into this table and tore it up and I was upon the floor with my flagman on top of me, when we finally got straightened up." (R., 12.)

The petitioner told how, after he got up, he made an investigation and concluded that someone (probably the engineer) in the engine had made a sudden application of the air brakes (R., 16). Petitioner testified that there was more than one way to apply the brake and stop the train. Near the end of his testimony the following questions and answers appear (R., 26):

> "Q. In addition to putting the train in an emergency braking situation, is there any other way you can slow down the speed of a train or stop it? A. Yes, you can make a service application.
>
> Q. Will you explain what a service application of the brake is? A. Well, that is when the engineer would draw it off gently and let it come to a gradual, easy stop."

Petitioner further testified that when the train went into this sudden stop he had no warning and there was nothing he could do to protect himself. He testified that the train

was not scheduled to stop in the vicinity of where this event took place, although they were within the Dayton yard limits (R., 19). During the 22 years plaintiff had been with the railroad, he had been riding only 3 or 4 or 5 times when the train was brought to such a sudden stop and that occurred when a train line would break or air hose bust. Never had it been as disastrous as this time.

Petitioner and his attending physician testified to the nature and extent of the injuries which resulted. Since that is not involved in this appeal we will not go into detail except to observe that plaintiff did receive permanent and disabling injuries, and he has been unable to work since the date of this occurrence.

On cross examination the petitioner testified that subsequent to his injuries the engineer admitted that he had made a sudden application of the brakes, and petitioner so reported the occurrence to the train master in Columbus. Based on this conversation with the engineer, petitioner, at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent. The contents of that report are as follows (R., 32):

> "CN 28, Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile engineman applied air in emergency causing rough stop. I was standing in cabin observing air gauge and when stop was made knocked me to floor of cabin bruising my hip."

The petitioner further testified that from his position in the caboose he could see nothing and that he had no personal knowledge of why the train was suddenly stopped.

On motion of the respondent the trial judge directed the jury to return a verdict for the respondent and the court entered judgment thereon on January 25, 1954. Petitioner's motion for new trial was filed on February 2, 1954 and overruled eleven months later on December 17, 1954.

On appeal the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court stating that:

> "There was a complete absence of probative facts to support the conclusion of negligence. Lavender v. Kurn, 327 U. S., 645 (1946). And negligence remains the sole basis of liability under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S., 54 (1943)."

SUMMARY OF ARGUMENT.

This is an action arising under the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following), but the issues transcend that Act.

The basis for the opinion of the Court of Appeals is not clear. Three interpretations of this opinion are possible:

(1) If the court is saying that the doctrine of res ipsa loquitur is ont applicable to actions brought under and by virtue of the Federal Employers' Liability Act, the ruling abolishes rights granted employees and the ruling is contrary to numerous decisions of the United States Supreme Court and other United States Courts of Appeals.

(2) If the court is saying that there was not sufficient evidence to permit the application of the doctrine of res ipsa loquitur and submit the case to the jury then the Circuit Court has placed an almost impossible burden of producing evidence upon the plaintiff and has reversed a former decision of the same court and established a direct conflict of authority between Circuit Courts and between this Circuit Court and several state courts.

(3) If the court is saying that the inference of negligence authorizing application of the doctrine of res ipsa loquitur has been rebutted as a matter of law, the court has substituted itself for the jury to determine whether an inference of fact had been rebutted contrary to principles announced by the Supreme Court of the United States.

The practical effect of the holding of the Circuit Court, if permitted to stand, will seriously erode, if not completely wipe out, the principle of res ipsa loquitur in the Sixth Circuit. It ignores the fact that railroads owe a *continuing duty* to provide a reasonably safe place for its employees to work. This error on res ipsa loquitur reaches beyond actions by railroaders. It involves a misconception of the respective functions of judge and jury.

ARGUMENT.

There can be no doubt that the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 et seq.) creates a positive legal duty for a railroad engaged in interstate commerce to provide a reasonably safe place for its employees, such as petitioner, to work. Respondent was under a legal duty to exercise due care for the safety of its employees; this was a continuing duty. *Bailey v. Central Vermont Railway, Inc.*, 319 U. S., 350 (1943); *United States Railroad Administration v. Monahan*, 79 2nd App., 309, 137 N. E., 778 (1923).

Petitioner's place to work, during the movement of the train, was in the caboose and the defendant railroad required that he prepare the bills of lading for the various freight shipments as the train moved from city to city.

Petitioner was injured from an obvious violation of the legal duty owed to him by respondent, to-wit: his place to work was made unsafe by the conduct of the respondent.

Res ipsa Loquitur is an appropriate and adequate vehicle to carry the petitioner's case to the jury.

This court has defined res ipsa loquitur and set forth the elements necessary for its application in *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89 (1912). At pages 98 and 99 the court held:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

In *Nashville, C. & St. L. Ry. Co. v. York,* 127 F. (2), 606 (6 CCA, 1942), it was stated:

> "The highest court has made it clear that while the res ipsa loquitur doctrine does not compel an inference of negligence from the facts of an occurrence, it does warrant such inference; that the facts of an occurrence furnish circumstantial evidence of negligence where direct evidence of the same may be lacking; that the evidence must be weighed, but not necessarily accepted as sufficient; that explanation or rebuttal is called for, though not necessarily required; that a case for the jury is made, though the jury's verdict is not forestalled; that the defendant's general issue is not converted into an affirmative defense; and that 'when all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.' Sweeney v. Erving, 228 U. S., 233, 240, 33 S. Ct. 416, 418, 576 Ed. 815."

Contrary to allegations put forth by the respondent (see page 8 of respondent's brief on petition for certiorari), the accident need not be explicable only in terms of negligence to invoke res ipsa loquitur, *Johnson v. United States,* 33 U. S., 46, 49 (1948).

This court has held that the doctrine of res ipsa loquitur is applicable to actions arising under the Federal Employers' Liability Act. *Jesionowski v. Boston & Maine Railroad,* 329 U. S., 452 (1947); *O'Neill v. The Baltimore & Ohio Railroad Company,* 348 U. S., 956 (1954), reversing 211 F. (2), 190.

The petitioner has not assumed the risk of negligence by the respondent in suddenly stopping a train. Title 45, Sec. 54, U. S. C.; *Devine v. Chicago R. I. & P. Ry. Co.,* 226 Ill., 248, 107 N. E., 595 (1914), affd. 239 U. S., 52 (1915).

It is manifest that the respondent had exclusive control over the "thing which causes injury", the train. Such control was exercised by the engineer and other employees of respondent in the engine. The petitioner, riding in the

caboose had no control over the train, and his injuries were completely without his fault. It is equally obvious that petitioner had no control over the respondent's yard limits where this occurred.

The sudden stopping and the resultant injuries to the petitioner were not "such as in the ordinary course of things" occur when the one having control of the train uses proper care. It is common knowledge that a train can and should be stopped without causing a person riding in the caboose to be violently thrown against a table, damaging the table, and then onto the floor with another person landing on top of him. The petitioner testified that a "service application" of the brakes could have been made bringing the train to a smooth stop. Anyone who has ever ridden in a train knows this and can envision the danger of a sudden, unexpected stop to passengers and employees on board. If occurrences such as this were the common thing to be anticipated, surely we would all seek safer means of transportation.

Certainly, in the words of the Supreme Court in *San Juan Light Company v. Requena*, 224 U. S., 89, 99:

> "* * * the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, (and) it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

Similar situations have been before the Federal Courts before, and on similar evidence the courts have held that res ipsa loquitur was applicable and the burden of going forward with the evidence was upon the defendant. The case of *Zumwalt v. Gardner*, 160 F. (2), 298 (8 CCA, 1947) is directly in point.

The plaintiff alleged that he was a switchman, employed by the defendant. While attempting to board a switch engine, "it suddenly, unexpectedly, and with an unusual and

violent jerk, threw and knocked him from the footboard of the engine," causing him to fall and be run over by the engine. He alleged that the action of the engine was caused by (1) the engineer negligently applying the emergency brakes or (2) defects in the braking system causing the brakes to be set in emergeney without fault of the engineer. At trial the engineer, called by the plaintiff, denied applying the emergency brake. *There was no evidence to contradict him.* The trial court withdrew the first alleged ground of negligence from the jury but submitted the second. On appeal, the Circuit Court of Appeals held that the trial court erred in withdrawing the first alleged ground of negligence from the jury. At page 302, the appellate court held:

> "* * * The sudden stopping of the engine resulting in jarring plaintiff from the footboard was, we think, circumstantial evidence of negligence because the engine was under the exclusive control and management of the defendant and the accident in the ordinary course of events would not have occurred if proper care had been observed."

In *Chesapeake & Ohio Ry. Co. v. Smith,* 42 F. (2), 111 (6 CCA, 1930), the plaintiff, employee, was riding in the caboose when the train of 98 cars stopped so suddenly he was thrown through the open vestibule. After the accident a break in the train line was found only twenty cars from the caboose. The plaintiff, himself an experienced brakeman, testified that a break in the train line only twenty cars from the caboose would make a "reasonable stop on the rear end," and that "an emergency application" of the brakes by the engineer was the only thing that could have caused the severe jolt. At page 114 this court held:

> "* * * On this assumption that the break was caused by the sudden application of the brakes by the engineer, plaintiff's evidence, in our judgment, sufficed to make applicable the rule of res ipsa loquitur as developed in the cited cases * * *"

In the very recent case of *The Kansas City Southern Railway Company v. Justis*, 232 F. (2d), 267 (1956), the Fifth Circuit Court of Appeals had before it these facts:

> "This action under the Federal Employers' Liability Act was brought by the appellee, a freight train conductor, as plaintiff, against the appellant railroad, as defendant. Plaintiff and brakeman Young were in the caboose at the rear of the train when it was brought to a stop for a scheduled inspection at Shoreline, Louisiana. According to their testimony, the train stopped with an unusual jerk or jolt, so extraordinary that the left side of plaintiff's neck hit against an iron safety pole a few inches away and he then hit the floor, and Young was propelled down the aisle in a run for 15 to 18 feet, and then he gripped a seat which broke the force of his forward movement."

On page 269 the court held:

> "There was ample evidence, as heretofore indicated, from which the jury could have found that the train stopped with such a sudden, extraordinary and violent jerk or jolt as ordinarily does not occur in the absence of someone's negligence."

The Circuit Court affirmed the District Court in submitting the case to the jury on the doctrine of res ipsa loquitur.

The court cited *Raze v. St. Louis Southwestern Ry. Co.*, 360 Mo., 222, 227 S. W. (2), 687, included at page 16 of our brief. It would appear from the facts in the *Justis* case that the instant case is even stronger in that Justis knew the train was about to stop. In the instant case, respondent had no warning of the sudden, violent stop which resulted in his injuries.

Several state court decisions are also worthy of attention. In *Missouri Pac. R. Co. v. Montgomery*, 186 Ark., 537, 55 S. W. (2), 68 (1933), cert. den. 289 U. S., 747 (1933), the plaintiff was a brakeman riding in the caboose. The

train suddenly and unexpectedly stopped, and plaintiff was thrown against a desk, sustaining severe injuries. The plaintiff testified that he believed the sudden stop was due to improper application of the air by the engineer. The engineer denied that he applied the brakes. The Supreme Court of Arkansas held that res ipsa loquitur was applicable and a jury issue was presented. The court observed:

> "It would of course have been impossible for the appellee (plaintiff) to have known of the existence of the negligence of the engineer because he was in the caboose sitting and could not have seen any evidence of the negligence before his injury."

Other state court decisions in which the doctrine of res ipsa loquitur has been applied to enable an injured railroader to recover damages due to the negligence of the railroad in suddenly stopping its train include:

Castonia v. Maine Cent. R., 78 N. H., 348, 100 A., 601 (1917);

Lamb v. Atlantic Coast Line R. Co., 179 N. C., 619, 103 S. E., 440 (1920);

Ft. Worth & D. C. Ry. Co. v. Stalcup (Tex.), 167 S. W., 279 (1914).

Among the passenger cases which are worthy of attention is *Southern Pac. Co. v. Hanlon*, 9 F. (2), 294 (9 CCA, 1925). The plaintiff was thrown to the floor by reason of the sudden stopping of the train, brought about by an emergency application of the brakes. The answer denied any negligence in so stopping and averred that the train was stopped to save the life of a trespasser who had missed his footing in attempting to board the train. The Court of Appeals held that this was clearly a res ipsa loquitur situation and that a jury question was presented as to whether the defendant had justified its act.

See also *McQuin v. Santa Fe Trail Transp. Co. et al.*, 155 Kans., 111, 122 P. (2), 787 (1942) and *Delaware Coach Co. v. Reynolds*, 45 Del., 226, 71 A. (2), 69 (1950).

Analogous to the instant case is the situation in which a train is derailed and the railroad claims it was due to the fault of a third person.

In *Fink v. New York Cent. R. Co.*, 144 Ohio St., 1, 56 N. E. (2), 456 (1944), the Supreme Court of Ohio held that res ipsa loquitur was applicable where the plaintiff, a United States Government mail clerk, proved that the mail car in which he was riding was derailed and that he was injured as a result. Defendant offered evidence that an automobile without lights, had been overturned on the tracks prior to the collision through no fault of the defendant and that the collision and consequent derailment could not have been avoided by defendant's employees. The trial court's refusal to charge on res ipsa loquitur and a verdict and judgment for defendant were reversed and remanded by the Supreme Court. On page 5 of its exhaustive opinion the court observed:

> "The particular justice of the doctrine rests upon the foundation that the true cause of the occurrence whether innocent or culpable is within the knowledge or access of the defendant and not within the knowledge or access of the plaintiff."

Under the Federal Employers' Liability Act, it frequently has been applied where railroad employees have been injured when the train on which they were riding was derailed. *Jesionowski v. Boston & Maine R. R. Co.*, 329 U. S., 452 (1947); *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2), 55 (8 CCA, 1947); *Nashville, C. & St. L. Ry. Co. v. York*, 127 F. (2), 606 (6 CCA, 1942); *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. (2), 271 (8 CCA, 1941), cert. den. 314 U. S., 680 (1941); *Lowery v. Hocking Valley Ry. Co.*, 60 F. (2), 78 (6 CCA, 1932).

Res ipsa loquitur has also been applied where a railroader was injured due to the sudden starting of a train. *Moore v. Grand Trunk Ry. Co.*, 93 Vt., 383 (1919), 108 A., 334; *Raze v. St. Louis, S. W. R. Co.*, 360 Mo., 222, 227 S. W. (2), 687 (1950).

The essential elements of res ipsa loquitur have been shown: the respondent owed to the petitioner a duty to exercise care in accordance with the dangers of the situation; the respondent had exclusive and complete control over its tracks and yard limits; the petitioner was entirely without fault; and the injuries were not such as in the ordinary course of things occurs if the respondent had used proper care. A jury issue was presented. The courts have so held in cases almost identical in their essential facts with this case as well as in analogous cases.

If the instant case is allowed to stand unaltered the ruling of this court in *O'Neill v. The Baltimore & Ohio Railroad Company*, 348 U. S., 956 (1954), reversing 211 F. (2), 190, will be effectively reversed, for the *O'Neill* case held that the Sixth Circuit Court of Appeals cannot substitute itself for the jury in determining issues of fact—in that case, as in this— whether the inference of negligence has been rebutted.

The United States Supreme Court has jealously guarded the worker's right to have his case submitted to the jury. *Wilkerson v. McCarthy*, 336 U. S., 53 (1949). And it cannot be contended that a jury finding for the plaintiff in this action would be mere speculation or conjecture, and the trial court's action defended on that ground.

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of

those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Lavender v. Kurn, 327 U. S., 645, 653 (1946).

The Court of Appeals for the Eighth Circuit recently expressed the law which should have been applied in this case:

"Only where the defendant's evidence of explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case. * * * And these in cases under the Federal Employers' Liability Act will be situations of the 'rarest exceptions'. * * *"

Chicago & N. W. Ry. Co. v. Green, 164 F. (2), 55, 60 (8 CCA, 1947)."

CONCLUSION.

The Court of Appeals for the Sixth Circuit has committed serious error in its decision on res ipsa loquitur.

The judgment in the instant case was based upon an erroneous concept of the law as regards res ipsa loquitur. If this misconception is allowed to stand unaltered it will result in serious erosion of the doctrine in the Sixth Circuit.

The judgments of the District Court and Circuit Court of Appeals should be reversed and petitioner should be granted a new trial.

Respectfully submitted,

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No. 46.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS.

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 46.

VIRGIL HERDMAN,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS.

STATEMENT OF THE CASE.

Because of several statements in the respondent's brief, which might tend to mislead the court, petitioner feels constrained to submit this reply brief. These statements relate both to law and facts; some are excerpts taken from the testimony of the petitioner but are statements of hearsay brought out by respondent on cross examination and other statements from which the respondent attempts to

draw a completely erroneous conclusion. No one testified but petitioner as to facts.

Can the court possibly conceive of any employee in the caboose of a train having personal knowledge as to why the engineer makes a sudden application of the brakes of the locomotive sixty-eight cars ahead?

Respondent would have this court believe that there was direct testimony by petitioner as to why this sudden stop was made, but an examination of the records shows that petitioner maintained throughout that the statements made were "what those guys told me. I can't see up there. I don't know." (R., 31) and "The engineer told me that." (R., 32) "He told me that." (R., 32).

In its statement of the "Question Presented for Review" and "Statement of the Case", respondent would have the court believe that there is evidence in the record that the train on which petitioner was riding at the time he sustained his injuries was brought to a stop because of an emergency: an automobile crossing respondent's tracks. *Such is not in evidence.* The only evidence is that the engineer of respondent's train *told* petitioner subsequent to the occurrence that this was why he brought the train to such a suddent and disastrous stop.

Respondent refers to petitioner's comments that *he* had to expect a sudden stop but there was nothing *he* could do about it. Respondent would have it appear that petitioner meant there is nothing the engineer could do about it. Of course, *petitioner meant there was nothing he personally could* do about it while in the caboose. At page 37 of the record, petitioner clearly stated his position:

> "I didn't have a way to avoid it. We can think about it but nothing we can do about it. We were just like a man in a ship out there in the middle of the ocean. You may think about it sinking. If it is going to sink, you are going to get wet."

Petitioner's complete dependence upon the engineer and the respondent's failure to provide any means for a warning to petitioner could not be pointed up more tersely.

The respondent also states, "The record lends no support to the allegation that petitioner was suffering pain at the time this report was made." We hasten to point out that even though the testimony of the doctor was not made a part of this record on appeal the petitioner himself stated that on the occasion when he signed the report;

> "I was suffering pretty much. I don't remember what I might have done." (R., 40)

Respondent must concede that petitioner has been unable to work for almost six years and never in his experience was a sudden stop so disastrous.

Respondent omits the fact there existed a continuing duty on the part of its engineer to exercise due care for the safety of the petitioner. Respondent omits the fact that this was an affirmative duty imposed by federal law, one which could not be discarded regardless of the circumstances.

ARGUMENT.

Under Section I of respondent's argument it is stated:

> "Negligence is the sole basis of liability."

That is fundamental. However, respondent goes on to state:

> "The law should not and does not permit the doctrine of res ipsa loquitur to be employed for such a purpose."

Petitioner was injured from an obvious violation of the legal duty owed to him by respondent, to-wit: his place to work was made unsafe by the conduct of the respondent. Res ipsa loquitur is an appropriate and adequate vehicle to carry the petitioner's case to the jury. This court has held that res ipsa loquitur is available in an appropriate action under the Federal Employers' Liability Act. *Jesionowski v. Boston & Maine Railroad,* 329 U. S., 452 (1947); *O'Neill v. The Baltimore & Ohio Railroad Company,* 348 U. S., 956 (1954), reversing 211 F. (2), 190.

Under Section IIA of respondent's argument it is stated:

> "The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law."

It is just such misleading statements of law which have resulted in this appeal. Petitioner does not argue that the engineer and his master should be *presumed* to be negligent, even under the facts of this case.

Because of the sudden stop of this train within the respondent's yard limits, petitioner submits that an *inference* of respondent's negligence may be drawn. This

principle is clearly supported by *Zumwalt v. Gardner*, 160 F. (2), 298 (8 CCA, 1947) and *Chesapeake & Ohio Ry. Co. v. Smith*, 42 F. (2), 111 (6 CCA, 1930) and other cases cited in petitioner's brief which are not distinguished in respondent's brief.

> "While the words presumption and inference are often confused, nevertheless there is a clear and definite distinction between them." *Fink v. N. Y. C. Rd. Co.*, 144 Ohio State, 1, 6, (1944).

In Section IIB of respondent's argument, respondent would have the court believe that there was direct evidence of why this sudden stop occurred and the "explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it." *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2), 55, 60 (8 CCA, 1947).

Further respondent argues "if hearsay evidence is admitted without objection, it is to be considered and accorded its natural probative effect." That what the engineer told petitioner constituted hearsay and a self-serving statement, respondent would appear to admit; however, we are constrained to point out to the court that petitioner did enter his objection on page 32 of the record:

> "Mr. McNamara: I want to object as to hearsay and what the engineer told this man is not subject matter for cross examination.
>
> Mr. Barton: I think it is entirely proper on cross examination.
>
> * * * * * * * * * *
>
> The Court: I will overrule the objection."

The respondent also relies upon the statement in *Lucid v. DuPont*, 199 F., 377:

> "* * * the doctrine is to be applied only when the nature of the accident itself, not only supports the

inference of defendant's negligence, but excludes all others."

This is not the law as expressed by this court.

In *Johnson v. United States*, 333 U. S., 46 (1947), Mr. Justice Douglas stated the law at page 48:

"No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked."

Such erroneous concepts of the law only serve to make it more imperative that this court reverse the lower courts' decisions in this case and firmly settle the law. It is obvious that unless this is done, res ipsa loquitur will be unduly restricted in the Sixth Circuit.

In Section IIC of respondent's brief it states:

"The knowledge of how the occurrence happened must be peculiarly within the knowledge of the defendant."

Again, this is not the law.

Res ipsa loquitur has frequently been applied when it is apparent from the facts that the accident is a mysterious occurrence as to which the defendant knows no more than the plaintiff. See *Hiell v. The Golco Oil Co.*, 137 Ohio St., 180, 28 N. E. (2), 561 (1940). Res ipsa loquitur has even been applied when the defendant is dead. In *Weller v. Worstall*, 50 Ohio App., 11 (1934), it is stated on page 17:

"As a last contention it is claimed that the doctrine can not be invoked against one who dies as a result of the same accident. It is stated that the real reason for the rule lies in the fact that the cause of injury is usually known by the defendant and unknown to the plaintiff, and that when the reason for the rule fails the rule becomes inoperative. In other words the

management and control of the automobile having been in the decedent, and he being dead, he can not now speak the true cause of the accident. That theory may be one of the reasons for the rule, but it is not the basic cause for its adoption."

As stated on page 302 of *Prosser on Torts*:

"If the circumstances are such as to create a reasonable inference of negligence, it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what had happened."

In any event it is clear that the petitioner had no knowledge of why the train was brought to a sudden stop. The only person having such knowledge must have been the person who brought it to such a stop. Whoever that was, respondent should have presented him as a witness.

All evidence as to why defendant's engineer stopped the train was hearsay to the plaintiff and was injected into the trial by defendant on cross examination, who submitted a report that had been prepared by one other than plaintiff and submitted to plaintiff only for signature.

In Section IID of respondent's argument the respondent argues, in effect, that the inference of negligence is overcome by virtue of the fact the automobile which was allegedly crossing or approaching the tracks (but which was not involved in any collision with the train) was not in the control of the defendant.

First it must be assumed that what goes on within the respondent's yard limit is within the control of the respondent.

Further in *Fink v. New York Cen. R. Co.*, 144 Ohio St., 1, 56 N. E. (2), 456 (1944), cited in petitioner's brief, the

Ohio Supreme Court was faced with the identical question. The court in that case held that res ipsa loquitur was applicable when the plaintiff was injured as a result of a collision between the train in which he was riding and an automobile which had been overturned at a crossing. The court held at page 10 of 144 Ohio St.:

> "* * * It should be kept clearly in mind that the train, the derailment of which caused plaintiff's injury, was under the exclusive management and control of the defendants and while it was entirely proper for the defendants to prove in explanation, the circumstances of the derailment, nevertheless, it was still a question of fact for the jury as to whether defendants had rebutted or overcome the inference of negligence arising from the derailment of the train."

SUMMARY.

The respondent has failed to justify any distinction between the cases relied upon by petitioner and the instant case. It is clear that a conflict of authorities exists between the circuits and between the Sixth Circuit and several state courts.

It is also apparent that the judgment in the instant case was based upon an erroneous concept of fact and of the law as regards res ipsa loquitur. If this misconception is allowed to stand unaltered it will result in serious erosion of the doctrine in the Sixth Circuit.

If the instant case is allowed to stand unaltered the ruling of this court in *O'Neill v. The Baltimore & Ohio Railroad Company*, 348 U. S., 956 (1954), will be effectively reversed, for the *O'Neill* case holds that the court cannot substitute itself for the jury in determining issues of fact—in that case, as in this—whether the inference of negligence has been rebutted.

CONCLUSION.

In view of the serious errors committed by the courts below, the judgment should be reversed. Petitioner should be granted a new trial.

Respectfully submitted,

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No. 347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MIDWEST LAW PRINTING AND PUBLISHERS INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 747.

VIRGIL HERDMAN,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED FOR REVIEW.

In an action to recover damages for personal injuries allegedly sustained when a train made an emergency stop where there is a total failure by plaintiff to establish that the stop was caused by defendant's negligence, can plain-

tiff rely upon the doctrine of *res ipsa loquitur* when his own positive, uncontradicted proof is that (1) the train was stopped to avoid striking an automobile at a grade crossing and (2) that in the ordinary course of things emergency stops are necessary from time to time, that in his experience as a railroader plaintiff had experienced such emergency stops many times, that they must be expected and there is nothing that can be done about it?

STATEMENT OF THE CASE.

On February 1, 1951, the petitioner, plaintiff in the original action, was performing his regular duties as a conductor on respondent's freight train and, as conductor, was in charge of such train. The train was proceeding at a slow rate of speed (R. 17a) on the main line of the railroad through a congested area in the city of Dayton, Ohio. It was a cold, winter day with snow blowing in the air (R. 42a). As the train approached a grade crossing of a public street at about 3:00 p. m., the train went into an emergency braking situation. Petitioner alleges that, because of the stop, he was thrown against a table and onto the floor of the caboose in which he was riding. Because the air immediately came back in the train line, petitioner knew that there was no defect in the train. The train proceeded on its journey. When the train made a scheduled stop three miles down the line, petitioner went up to the locomotive where the engineer told him that he had made the emergency stop to avoid striking a load of school children in an automobile that had come onto the tracks at the crossing (R. 46a).

The day following these events petitioner made and filed a report (Defendant's Ex. A; R. 42a to 45a) as he was required to do in his capacity as conductor, which report

he gave to appellee's trainmaster and in which he described the incident herein involved and the reason for the emergency stop. That report, known as a CT 75 A, was made and signed by petitioner and reads in part as follows:

> "CN 28 Enginer 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile, engineman applied air in emergency causing rough stop."

Petitioner testified that he has known of emergency applications of brakes "many times" (R. 50a, 51a) and that "We got to expect them or think about them" (R. 53a). In response to a question made at the taking of petitioner's deposition with respect to whether petitioner had ever ridden in a caboose before when there was an emergency application of steam, petitioner replied, "Many times" (R. 50a) and further, that you have to expect an emergency stop at all times and there is nothing that can be done about it (R. 52a).

Petitioner's action was commenced in the District Court of the United States for the Southern District of Ohio, Eastern Division, which court sustained the motion of respondent for directed verdict at the close of petitioner's case. The decision of the District Court was reviewed by and argued in the United States Court of Appeals for the Sixth Circuit, which court unanimously affirmed the action of the District Court. The order of the Court of Appeals was entered on the thirteenth day of December, 1955, and stated in part:

> "We think the district judge performed his duty in directing a verdict for the appellee. There was 'a complete absence of probative facts to support the conclusion' of negligence, Lavender v. Kurn, 327 U. S. 645 (1946). And negligence remains the sole basis of

liability under the Federal Employer's Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1943).

The judgment is affirmed."

Your respondent observes that in petitioner's statement of the case (page 5 of the petition) petitioner indicates that never in his experience had previous sudden stoppings of the train been as disastrous as this time. We submit that proof of record lends no support to this allegation. And, at page 6 of his petition, it is indicated that petitioner "at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent." We are constrained to point out that the report in question was made and signed by petitioner the day following the events complained of while his memory was fresh (R. 43a) and that it was his duty as conductor to make such reports (R. 53a). Nor does the record lend support to the allegation that petitioner was suffering pain at the time this report was made.

STATUTES INVOLVED.

Petitioner based his amended complaint upon the Federal Employer's Liability Act. The proceedings below raise no issue regarding the meaning, extent or applicability of that act to this case other than the fact that that Act establishes negligence as the sole basis of liability. Because there was a total failure to establish negligence, the District Court directed a verdict for respondent. That action was unanimously affirmed by the Sixth Circuit Court of Appeals.

ARGUMENT.

I.

Negligence is the Sole Basis for Liability.

Congress, in enacting the Federal Employer's Liability Act, established negligence of the employer as the basis for any recovery by employees in cases where the Act might apply. This is supported by numerous decisions. In *Fantini v. Reading Co.*, 147 F. 2nd, 543, a directed verdict case, the Third Circuit Court of Appeals stated in part:

> "The right of action conferred by the Federal Employer's Liability Act rests upon requisite proof of the employer's negligence as to the proximate cause of the employee's injury or death."

Because of his total failure to meet this burden of proof, petitioner has sought to save his case by the application of the doctrine of *res ipsa loquitur*.

II.

The Doctrine of Res Ipsa Loquitur Has No Application.

The decisions of this court, the various circuit and state courts have established that the doctrine of *res ipsa loquitur* has no application in a case unless, at least, all four of the conditions hereinafter noted are met:

A. The Accident Must Have Been One Which Would Not Happen in the Ordinary Course of Events if Those Who Had the Management or Control Had Exercised Proper Care. *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89 (1912).

This condition for application of the doctrine has not been met because petitioner's own evidence indicates that the suddent stopping of a train actually does occur in the ordinary operation of a railroad (R. 52a), that petitioner has known of emergency applications of brakes "many times" (R. 50a), that it must be expected at all times (R. 52a), and that an emergency application of brakes must be expected when an engineer is confronted with an emergency such as he was in this case (R. 52a).

The train on which petitioner was riding was brought to an emergency stop to prevent striking an automobile at a grade crossing. Under these facts the trial court correctly decided that this was not the sort of accident or situation in which the doctrine of *res ipsa loquitur* applies. We refer to a portion of the opinion of the trial court, wherein the court stated as follows:

> "Whether or not a case is one to which the doctrine of *res ipsa loquitur* applies is a question of law for the judge to decide. So, I have decided in this case that this is not the sort of accident or situation in

which the doctrine of *res ipsa loquitur* applies. In order for it to be such a case, it would have to be a situation, a set of facts where the accident happened is something that would not happen in the ordinary course of events. In this case, it would have to be that an emergency stop would not happen in the ordinary course of operating a railroad.

The plaintiff has testified in this case, that he has been in a caboose some five, six or seven times, at least when an emergency stop was made and that you always have to expect an emergency stop to be made, and that there isn't anything that you can do about it." (R. 58a)

It is pure self-contradiction for petitioner, after his own testimony together with the common experience of men, now to contend that emergency stops do not happen in the ordinary course of operating a railroad. The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law.

> "In the final analysis, each case seeking to invoke the doctrine must stand or fall upon its own facts. *Res ipsa loquitur* is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience." *Williams v. United States,* 218 F. 2nd, 473, 476 (5 C.C.A.)

Human experience in cases such as the one at bar compels the conclusion that negligence is not to be inferred by reason of a mere emergency stopping of a train. It is not to be inferred in the instant case.

Res ipsa loquitur also cannot be applied unless:

B. The Accident Must Have Happened Under Circumstances Which Leave No Reasonable Conclusion Other Than Negligence of Defendant. *Lucid v. DuPont*, 199 F., 377 (9 C.C.A.); *Dierks Lumber & Coal Co. v. Brown*, 19 F. 2nd, 732 (8 C.C.A.).

This condition is not present in the instant case.

> "The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others." *Lucid v. DuPont* (supra).

The evidence in this case does not support any inference of negligence on the part of respondent. Petitioner admits having made (R. 42a) and signed (R. 43a) a report known as a CT 75 A (Defendant's Ex. A; R. 42a to 45a) which report he was required to file as conductor and employee in charge of respondent's train. This report is quoted in respondent's statement herein and indicates the reason for the emergency stop, to-wit, to prevent striking an automobile at a crossing. Petitioner admits that the engineer of the train told him that there was a load of school children in an automobile and he stopped to avoid striking that automobile (R. 46a). We submit that such action on the part of respondent's engineer, far from being a failure to exercise "proper management and control," rather, epitomized due care in the premises. See *Canton Motor Coach, Inc. v. Hall*, 46 Ohio App., 516. Thus, evidence adduced in petitioner's own case not only dismisses negligence as a reasonable conclusion, but completely destroys any plausible argument for the application of the doctrine of *res ipsa loquitur*. The law in Ohio is stated in

the second syllabus of *Krupar v. Procter & Gamble Co.*, 160 Ohio St., 489 (1954):

> "2. In a negligence action if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant. (Paragraph three of the syllabus in the case of Gedra v. Dallmer Co., 153 Ohio St. 258, approved and followed.)"

Res ipsa loquitur also cannot be applied unless:

C. The Knowledge of How the Occurrence Happened Must Be Peculiarly Within the Knowledge of Defendant. *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. 2nd, 271 (8 C.C.A.).

The cause of the sudden stopping of respondent's train was known to the petitioner. In fact, it was his report to the respondent, which it was his duty to make, that advised respondent of the stopping and the reason therefor. Hence, the doctrine is not available. We quote from 65 *C. J. S.*, 1002, Negligence, Sec. 220 (6):

> "Although * * * the doctrine of *res ipsa loquitur* provides a substitute for direct proof of negligence, the rule is nevertheless one of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available. Hence, the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear."

And, commenting on the doctrine in a separate opinion in *Johnson v. United States*, 333 U. S., 46, Mr. Justice Frank-

furter stated at page 53, "It is, after all, a rule of necessity to be invoked only when necessary evidence is absent and not readily available."

The evidence in the instant case is not absent, but rather is in the record as a product of petitioner's own case in chief.

Nor can the doctrine apply unless:

D. The Instrumentality Causing the Injury Must Have Been in the Exclusive Control of Defendant. *Smith v. Baltimore & O. R. Co.*, 204 F. 2nd, 162 (6 C.C.A.).

The events of which petitioner complains occurred in a well built up area in the city of Dayton, Ohio (R. 26a), on a cold winter day with the snow blowing (R. 42a) and at a "crossing just east of Dayton Rubber Works" (R. 45a), on the main line of respondent's railroad, and on a regular run from Richmond, Indiana to Columbus, Ohio. The instrumentality proximately causing the alleged injuries was an automobile on a public highway—a situation completely out of and apart from respondent's control.

In the recent case of *Smith v. Baltimore & O. R. Co.*, 204 F. 2nd, 162, the Sixth Circuit Court of Appeals, which affirmed the decision of the District Court in the instant case, held that the doctrine of *res ipsa loquitur* had no application to a case in which defendant's train collided with a tractor-trailer at a grade crossing, resulting in the death of a brakeman, for the reason that the tractor-trailer which collided with the locomotive was not under the control of defendant. This court denied certiorari in 346 U. S., 838. Similarly, respondent in the instant case had no control over the automobile on the crossing which created an emergency and resulted in the sudden stopping here.

III.

Cases Cited by Petitioner Distinguished.

Petitioner relies heavily on the case of *Zumwalt v. Gardner*, 160 F. 2nd, 298, in which plaintiff, a switchman, attempted to board a switch engine when the engine, for some unknown reason, went into an emergency stop and jarred plaintiff off backwards. The court stated at page 302:

> "This occurrence and the circumstances surrounding it furnished evidence from which the jury might have inferred negligence which if not explained or not explained satisfactorily would have supported a verdict for plaintiff. We do not mean by this that this evidence compelled a verdict for plaintiff, but only that it would have warranted such a verdict."

The instant case is to be distinguished in that the reason for the emergency stop is in evidence and is known to this petitioner. In the *Zumwalt* case, some of the testimony was in conflict with admitted physical facts and one of the grounds pleaded was based on the Safety Appliance Act. Neither of these factors are present in the instant case.

Petitioner several times mentions that the train in question was moving within respondent's yard limits. As we commented in the next preceding section herein, regarding the instrumentality and its exclusive control, the events of which petitioner complains occurred at a public highway crossing in a congested area in Dayton, Ohio. This most certainly must be distinguished from situations in which the sudden stopping occurs in a switching operation in the switch yards of a railroad wherein the railroad maintains control over the entire area.

Petitioner also seeks support from the case of *Chesapeake & Ohio Ry. Co. v. Smith*, 42 F. 2nd. 111. There, the

evidence showed that defendant's train was sent down the wrong track through the negligence of the head brakeman in throwing the wrong switch in defendant's switching yards and that after it had proceeded but eight car lengths it came to a sudden stop. The court stated at page 114:

> "But, in view of the brakeman's initial mistake, the violence of the stopping, the fact that the accident occurred in broad daylight, *and the complete absence of any evidence of such a sudden emergency, there seems to be no outstanding probable cause of the accident other than defendant's negligence.*". (Emphasis ours.)

In the case at bar there is no evidence of an "initial mistake" and in the record, rather than "complete absence", there is proof of the emergency and the reason why the engineer, in the exercise of due diligence, stopped the train.

Passenger cases cited by petitioner are likewise distinguishable in that, "a carrier for hire owes to a passenger the highest degree of care known to the law, whereas the interstate carrier owes to the employee only what we call ordinary care * * *" *Cochran v. Pittsburgh & L. E. R. Co.*, 31 F. 2nd, 769, 773 (6 C.C.A.).

IV.

Petitioner Has Failed to State a Case for Writ of Certiorari.

The decision of the Court of Appeals below does not, as petitioner suggests, establish a conflict of authority. And most certainly the court did not say, nor is it the contention of this respondent, that the doctrine of *res ipsa loquitur* is not applicable to actions under the Federal Employer's Liability Act. Nor can we in any way agree with petitioner wherein he concludes that the effect of the decision of the Sixth Circuit Court of Appeals in this case is to wipe out the doctrine in the Sixth Circuit. Manifestly, this is

not true. The record merely establishes that (1) this case is not one for application of the doctrine, and (2) whatever argument there might have been for the application of the doctrine is destroyed by evidence in petitioner's own case in chief.

Petitioner quotes in his petition (p. 10) from *Sweeney v. Erving*, 228 U. S., 233. This decision was amplified and explained in *Gray v. B. & O. R. Co.*, 24 F. 2nd, 671 (7 C.C.A.), wherein the court after quoting from the *Sweeney* case stated:

> "Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury,' the court meant that unexplained, the facts made a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, 'it is evidence to be weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'
>
> "If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury, such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, where the Court restated a well known rule: 'The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and shall be directed for the other party' * * *"

Did the trial court abuse his judicial discretion in directing a verdict for respondent? This is the question petitioner should be asking—not whether the doctrine of *res ipsa loquitur* applies in the premises.

The doctrine, if it did apply, does not preclude the court's directing a verdict for respondent. *Dierks Lumber & Coal*

Co. v. Brown, 19 F. 2nd, 732 (8 C.C.A.); *Terminal R. Assn. of St. Louis v. Staengel,* 122 F. 2nd, 271 (8 C.C.A.). For, as this court has stated, the doctrine *does not* avoid the requirement that upon the whole case, petitioner must prove a breach of the duty of due care by a preponderance of the evidence. *Commercial Molasses Corp. v. New York T. B. Corporation,* 314 U. S., 104 (1941). The trial judge heard the facts and drew the following conclusion in his statement to the jury:

> "Now, for the plaintiff to recover against the defendant in this case, he must show negligence against the defendant; that is, he must show that he was injured through the negligence of the defendant acting through some of its employees. I think, as may have been said to you on your voir dire examination, that this is not a situation like we have in Ohio, under the Workman's Compensation Law, where all a person has to do is to show that he was injured while in the performance of his duties. This case comes under a federal law, that is, a law passed by the Congress of the United States, and its only provision is that an employee who is injured may recover against the defendant for the negligence of the defendant, And so, the court comes to the conclusion that this is not the sort of case where negligence may be inferred and there is no proof of negligence." (App., 58A-59A.)

The entire case was reviewed and heard on the briefs and oral argument by the Sixth Circuit Court of Appeals. That court unanimously affirmed the action of the District Court judge. Respondent resolutely submits that this is not a case for the granting of a writ of certiorari. Two courts have concurred in their views of the case and petitioner has failed to bring himself within Rule 19 of the Rules of the Supreme Court of the United States, which indicates the considerations which govern review on certiorari. We refer to the separate opinion of Mr. Justice

Roberts, in the case of *Bailey v. Central Vermont R. Co.*, 319 U. S., 350 (1942), quoting in part at page 358:

> "It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government."

Manifestly, this court should not sit in review of lower courts which have properly applied the well established and settled law.

CONCLUSION.

In conclusion, it is submitted that the decision of the Court of Appeals affirming the District Court in this case is entirely in accordance with the controlling decisions of this court as well as the controlling decisions of other courts of appeals hereinabove cited.

The district judge did not violate judicial discretion in directing a verdict for respondent under the facts and evidence presented. Concomitantly, there is no irreconcilable conflict between the circuits as a result of the affirmance by the Court of Appeals below. Petitioner has failed to state a sufficient cause to merit further consideration by this court on writ of certiorari.

Wherefore, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 46.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

On Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 46.

VIRGIL HERDMAN,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

In an action to recover damages for personal injuries allegedly sustained by petitioner, a freight conductor riding in the caboose of respondent's train, when the train made an emergency stop and where there is a total failure to establish that the stop was caused by respondent's neg-

ligence, did the District Court act properly in refusing to apply the doctrine of res ipsa loquitur when petitioner's own positive, uncontradicted proof is that (1) the train was stopped to avoid striking an automobile at a grade crossing and (2) that in the ordinary course of operating a railroad, emergency stops are necessary and that in his experience as a railroader petitioner had experienced emergency stops many times, and that they must be expected and there is nothing that can be done about it, and did the District Court act properly in directing a verdict for respondent and in finding that petitioner failed in his burden of proving negligence?

STATEMENT OF THE CASE.

On February 1, 1951, the petitioner, plaintiff in the original action, was performing his regular duties as a conductor on respondent's freight train and, as conductor, was in charge of such train. The train was proceeding at a slow rate of speed (R., 12) on the main line of the railroad through a congested area in the city of Dayton, Ohio. It was a cold, winter day with snow blowing in the air (R., 29, 30). As the train approached a grade crossing of a public street at about 3:00 p. m., the train went into an emergency braking situation. Petitioner alleges that, because of the stop, he was thrown against a table and onto the floor of the caboose in which he was riding. Because the air immediately came back in the train line, petitioner knew that there was no defect in the train (R., 34). The engineer told petitioner that he had made the emergency stop to avoid striking a load of school children in an automobile that had come onto the tracks at the crossing (R., 33).

The day following these events petitioner made and filed a report (Defendant's Ex. A; R., 31, 32) as he was required to do in his capacity as conductor, which report he gave to respondent's trainmaster and in which he described the incident herein involved and the reason for the emergency stop. That report, known as a CT 75 A, was made and signed by petitioner and reads in part as follows:

> "CN 28 Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile, engineman applied air in emergency causing rough stop."

Petitioner testified that he has known of emergency applications of brakes "many times" (R., 36) and that "We got to expect them or think about them" (R., 37). In response to a question made at the taking of petitioner's deposition with respect to whether petitioner had ever ridden in a caboose before when there was an emergency application of steam, petitioner replied, "Many times" (R., 36) and further, that you have to expect an emergency stop at all times and there is nothing that can be done about it (R., 37).

Petitioner's action was commenced in the District Court of the United States for the Southern District of Ohio, Eastern Division, which court sustained the motion of respondent for directed verdict at the close of petitioner's case. The decision of the District Court was reviewed by and argued in the United States Court of Appeals for the Sixth Circuit, which court unanimously affirmed the action of the District Court. The order of the Court of Appeals

was entered on the thirteenth day of December, 1955, and stated in part:

> "We think the district judge performed his duty in directing a verdict for the appellee. There was 'a complete absence of probative facts to support the conclusion' of negligence, Lavender v. Kurn, 327 U. S. 645 (1946). And negligence remains the sole basis for liability under the Federal Employers' Liability Act. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1946).
>
> The judgment is affirmed."

Your respondent observes that in petitioner's statement of the case (page 6 of his brief) petitioner indicates that never in his experience had previous sudden stops of the train been as disastrous as this time. We submit that proof of record lends no support to this allegation. And, at page 6 of his brief, it is indicated that petitioner "at a later date, while suffering pain from his injuries, signed a report prepared and written by some other employee of the respondent". We are constrained to point out that petitioner stated on cross examination as follows (R., 30):

> "Q. And did you make such a report in this case? A. I did.
>
> Q. And did you sign that report? A. Yes, sir.
>
> Q. And to whom was the report given? A. To the train master.
>
> Q. And when was the report made? A. The following day.
>
> Q. And of course, your recollection of what you were doing would have been much better the following day than it is today, wouldn't it? A. Well, it was fresh in my memory at the time."

So it is that the report in question was made and signed by petitioner the day following the events complained of while his memory was fresh (R., 30) and that it was his

duty as conductor to make such reports (R., 38). The record lends no support to the allegation that petitioner was suffering pain at the time this report was made.

SUMMARY OF ARGUMENT.

In a case arising under the Federal Employers' Liability Act, the burden of proof is on the plaintiff to establish negligence of the employer which proximately caused his injury. Petitioner herein has wholly failed to establish negligence in this cause and to save his case, seeks to rely on the doctrine of res ipsa loquitur.

This doctrine, however, cannot be availed of by petitioner where evidence adduced in petitioner's own case establishes the following:

A. That the circumstances of the accident fail to present a situation such that does not occur where proper care has been exercised. Petitioner's own testimony has established that emergency applications of brakes do occur in the ordinary course of operating a railroad.

B. That the actual cause of the events complained of is not unexplained but rather is in evidence as a product of petitioner's own case in chief. Petitioner made and signed a report to his employer in which he states that the emergency stopping of respondent's train was made to avoid striking an automobile at a crossing and the contents of this report are in evidence in the record of this case.

C. The knowledge of how the occurrence happened is not peculiarly within the knowledge of this respondent, but rather is known to petitioner. Also, the testimony of other members of respondent's train crew is no less readily available to petitioner than it is to respondent.

D. The instrumentality causing the injury was an external factor not within the exclusive control of respondent, to wit, an automobile at a grade crossing.

The action of the trial court in directing a verdict for respondent, which action was unanimously affirmed by the Court of Appeals, was based upon the application of sound legal principles as announced by this court. Petitioner's evidence established no more than that (1) he allegedly sustained injuries while riding in a caboose when the train was brought to a sudden stop, and (2) the sudden stop was made to avoid striking an automobile at a grade crossing. Petitioner failed to meet the burden of proof which the law has imposed, and to permit the issues raised by petitioner's evidence to go to the jury would be to permit a verdict based upon speculation and conjecture. Accordingly, the decision of the Court of Appeals should be affirmed.

ARGUMENT.

I.

Negligence is the Sole Basis of Liability.

The Federal Employers' Liability Act establishes negligence of the employer as the sole basis for any recovery by employees in cases where the Act might apply. Title 45, Section 51, U. S. C. It is incumbent upon the plaintiff to prove negligence which caused the accident in order to recover under the Federal Employers' Liability Act. *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S., 573.

In *Fantini v. Reading Co.*, 147 F. 2d, 543, a directed verdict case, the Third Circuit Court of Appeals stated in part:

> "The right of action conferred by the Federal Employers' Liability Act rests upon requisite proof of the employer's negligence as to the proximate cause of the injury or death."

Petitioner has totally failed to meet this burden of proof. The inability to establish negligence where, in fact, respondent was not negligent was anticipated by petitioner. In his original complaint, petitioner pleaded specific allegations of negligence. However, the day before commencement of the trial in the District Court, petitioner amended his complaint in an effort to establish a basis for the assertion of the doctrine of res ipsa loquitur, under which doctrine he now attempts to save his unproved case. The law should not and does not permit the doctrine of res ipsa loquitur to be employed for such a purpose.

II.

The Doctrine of Res Ipsa Loquitur Has No Application.

We would strongly urge upon this court that the mere fact of injury raises no inference of negligence and if a plaintiff is to be permitted to substitute this doctrine in making out his case, in place of direct evidence of negligence, the particular circumstances of each such case should be carefully examined to see if applicability of the doctrine is warranted. Respondent resolutely submits that the circumstances of the instant case do not warrant its application. Factors to be considered in applying the doctrine are set forth following.

A. The Accident Must be Such That It Does Not Occur if Proper Care is Exercised.

We adopt the language in the case of *San Juan Light & Transit Co. v. Requena*, 224 U. S., 89, 99, as quoted by petitioner:

> "* * * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, *and the injury is such as, in the ordinary course of things, does not occur if the one, having such control uses proper care,* it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." (Emphasis added)

Does the sudden stopping of a train fit the above pattern? The answer is furnished by petitioner's own evidence. Petitioner himself testified that the sudden stopping of a train actually does occur in the ordinary operation of a railroad (R., 36), that petitioner has known of emergency applications of brakes "many times" (R., 36),

that it must be expected at all times (R., 37), and that an emergency application of brakes must be expected when an engineer is confronted with an emergency such as he was in this case (R., 37).

The train on which petitioner was riding was brought to an emergency stop to prevent striking an automobile at a grade crossing. Under these facts the trial court correctly decided that this was not the sort of accident or situation in which the doctrine of res ipsa loquitur applies. We refer to a portion of the opinion of the trial court, wherein the court stated as follows:

> "Whether or not a case is one to which the doctrine of *res ipsa loquitur* applies is a question of law for the judge to decide. So, I have decided in this case that this is not the sort of accident or situation in which the doctrine of *res ipsa loquitur* applies. In order for it to be such a case, it would have to be a situation, a set of facts where the accident happened is something that would not happen in the ordinary course of events. In this case, it would have to be that an emergency stop would not happen in the ordinary course of operating a railroad.
>
> The plaintiff has testified in this case, that he has been in a caboose some five, six or seven times, at least when an emergency stop was made and that you always have to expect an emergency stop to be made, and that there isn't anything that you can do about it." (R., 41, 42).

It is pure self-contradiction for petitioner, after his own testimony together with the common experience of men, now to contend that emergency stops do not happen in the ordinary course of operating a railroad. The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law.

A number of state court decisions affirm the rule that the sudden stopping of a train is not of such unusual character as to permit application of the doctrine. *St. Louis & S. F. R. Co. v. Dorman,* 205 Ala., 609, 89 So., 70; *Hunt v. Chicago, B. & Q. R. Co.,* 181 Iowa, 845, 165 N. W., 105; *Missouri K. & T. R. Co. v. Taylor,* 69 Okla., 79, 170 P., 1148; *McGraw v. Southern R. Co.,* 206 N. C., 873, 175 S. E., 286. We submit that this is particularly true where the party complaining testifies that it is not an unusual occurrence.

The Fifth Circuit Court of Appeals has stated:

> "In the final analysis, each case seeking to invoke the doctrine must stand or fall upon its own facts. *Res ipsa loquitur* is a rule based upon human experience and its application to a particular situation must necessarily vary with human experience." *Williams v. United States,* 218 F. 2d, 473, 476.

Is it not more plausible to assume that good and sufficient reason existed for making an emergency stop than to assume it was made for absolutely no reason at all, contrary to all good railroad practice? Human experience in cases such as the one at bar compels the conclusion that negligence is not to be inferred in the instant case.

B. If the Actual Cause of the Events Complained of is in Evidence the Doctrine Does Not Apply.

The emergency stopping of respondent's train was made to avoid striking a load of school children in an automobile at a public crossing. Petitioner admits having made (R., 30) and signed (R., 30), a report known as a CT 75 A (Defendant's Ex. A; R., 30 to 32) which report he was required to file as conductor and employee in charge of respondent's train. This report, quoted in the statement of the case, supra, indicates the emergency stop was made to prevent

striking an automobile at a crossing, and petitioner admits that the engineer of the train told him that there was a load of school children in an automobile and he stopped to avoid striking that automobile (R., 33). Petitioner, in his brief at page 6, infers that this report is hearsay, being based on a conversation and having been prepared by some other employee.

We emphasize that petitioner's report of this accident was read into the record without objection (R., 31, 32), and is to be given its natural probative effect. This court has before applied the rule that if hearsay evidence is admitted without objection, it is to be considered and accorded its natural probative effect. *Spiller v. Atchison T. & S. F.*, 253 U. S., 117; *Diaz v. United States*, 223 U. S., 442. Even more so, then, is this report competent evidence since petitioner admits having signed it (R., 30) and that he made such a report in this case (R., 30) in discharge of his responsibilities as conductor of the train.

We submit that the reason for the sudden stopping on the part of respondent's engineer, far from being a failure to "exercise proper care by the one having control," rather, epitomized due care in the premises. See *Canton Motor Coach, Inc. v. Hall*, 46 Ohio App., 516. The reason for the sudden stopping being in evidence as a part of petitioner's own case, negligence of respondent is not only dismissed as a reasonable conclusion, but any plausible argument for the application of res ipsa loquitur is completely destroyed. The Ninth Circuit Court of Appeals has stated the rule as follows:

> "The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the

defendant's negligence, but excludes all others." *Lucid v. Du Pont,* 199 F., 377.

To the same effect is *Dierks Lumber & Coal Co. v. Brown,* 19 F. 2d, 732.

The Sixth Circuit Court of Appeals analyzed the doctrine in *Cochran v. Pittsburgh & L. E. R. Co.,* 31 F. 2d, 769, at page 772 as follows:

> "The res doctrine is not applicable, or, in other words, negligence will not be inferred merely by proving or alleging the relation of carrier for hire and injury to a passenger while on his journey, or proof of the relation of master and servant and injury in the course of his employment, even under the Federal Employers' Liability Act. Something more is required. The circumstances characterizing the accident must be alleged and proved. These circumstances must create a reasonable probability that the accident was due to negligence, rather than to pure accident or act of God; that the defendant or its employees, other than the one injured, should have had control of the agency as would not ordinarily have happened, if ordinary care had been exercised; that the circumstances did not leave outstanding another existing and equally probable cause of the accident, not depending on the master's negligence, and for which he would not be liable; that the circumstances of the accident were such that the means and opportunity of finding out how it happened, or what caused it, are more properly within the knowledge and control of the master than of the servant."

The Ohio law in this regard is expressed in the second syllabus of the recent case of *Krupar v. Procter & Gamble Co.,* 160 Ohio St., 489 (1954):

> "In a negligence action if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the

negligence of the defendant. (Paragraph three of the syllabus in the case of Gedra v. Dallmer Co., 153 Ohio St. 258, approved and followed.)"

In the instant case not only do the circumstances leave outstanding another existing and equally probable cause, but the actual cause is in evidence as a part of petitioner's own case.

C. The Knowledge of How the Occurrence Happened Must be Peculiarly Within the Knowledge of Defendant.

Many decisions justify application of the rule on the ground that the knowledge of how the occurrence happened is peculiarly within the knowledge of the defendant. *Terminal R. Ass'n of St. Louis v. Staengel*, 122 F. 2d, 271, 276; *Cochran v. Pittsburgh & L. E. R. Co.*, 31 F. 2d, 769, supra; *Pitcairn v. Perry*, 122 F. 2d, 881. But here the petitioner himself knows the reason for the stopping as evidenced by the report which he made and signed and delivered to respondent as it was his duty so to do. We quote from 65 *C. J. S.*, 1002, Negligence Sec. 220 (6):

"Although, as discussed supra Sec. 220 (3), the doctrine of res ipsa loquitur provides a substitute for direct proof of negligence, the rule is nevertheless one of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available. Hence, the presumption or inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has knowledge and testifies as to the specific act of negligence which is the cause of the injury complained of, or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant upon the occurrence clearly appear."

We believe it to be of particular significance that petitioner failed to present the testimony of any other member of respondent's train crew, the only testimony offered by petitioner in support of his case being that of himself and his doctor. Such testimony would have been no less readily available to petitioner than it would have been to this respondent. An Illinois appellate court made a similar observation in the case of *Chestnut v. L. & N. R. Co.*, 81 N. E. 2d, 660, stating in part as follows:

> "* * * In the case at bar there is no reason shown why plaintiff could not have produced the evidence of the other members of the crew to have given the court and jury the benefit of testimony of acts and omissions by them and it cannot be said that this evidence was any more readily available to the defendant than it was to the plaintiff. * * *"

Mr. Justice Frankfurter commented on the doctrine in a separate opinion in *Johnson v. United States*, 333 U. S., 46, stating at page 53, "It is, after all, a rule of necessity to be invoked only when necessary evidence is absent and not readily available." In the instant case, the necessary evidence is in the record as a product of petitioner's own case in chief.

D. The Instrumentality Causing the Injury Must Have Been in the Exclusive Control of Defendant.

The heading of this sub-section illustrates another element requisite to application of res ipsa loquitur. *Southern R. Co. v. Bennett*, 233 U. S., 80. The instrumentality here involved is an external factor, an automobile at a crossing.

It is important to distinguish between the area in which this accident occurred and an emergency stopping situation which occurs in the confines of railroad switch yards wherein the railroad maintains control over the entire area.

Notwithstanding petitioner's misleading allegation that the train was moving within respondent's yard limits, the evidence establishes the scene of the accident as being a well built up area in the city of Dayton, Ohio (R., 18), on a cold winter day with the snow blowing (R., 29, 30) and at a "crossing just east of Dayton Rubber Works" (R., 32), on the main line of respondent's railroad, and on a regular run from Richmond, Indiana to Columbus, Ohio. The instrumentality proximately causing the alleged injuries was an automobile on a public highway— a situation completely out of and apart from respondent's control.

In the recent case of *Smith v. Baltimore & O. R. Co.*, 204 F. 2d, 162, the Sixth Circuit Court of Appeals, which affirmed the decision of the District Court in the instant case, held that the doctrine of res ipsa loquitur had no application to a case in which defendant's train collided with a tractor-trailer which collided with the locomotive was not under the control of defendant. This court denied certiorari in 346 U. S., 838. Similarly, respondent in the instant case had no control over the automobile on the crossing which created an emergency and resulted in the sudden stopping here.

Respondent respectfully urges upon this court, that while any one of the four arguments outlined in this Section II of its brief dismisses this case as being one for the application of the doctrine, certainly the collective arguments which this case provides compels the conclusion that it is not a res ipsa loquitur situation.

III.

The Direction of Verdict For Respondent Was Proper.

No less important than the question of whether res ipsa loquitur applies in this action is the separate issue of whether the trial judge abused his judicial discretion in directing a verdict for respondent. It is a well settled rule that even where the doctrine of res ipsa loquitur does apply, which respondent resolutely denies in this case, this does not preclude the direction of a verdict for the defendant. *Southern R. Co. v. Bennett*, 233 U. S., 80; *Dierks Lumber & Coal Co. v. Brown*, 19 F. 2d, 732; *Terminal R. Assn. of St. Louis v. Staengel*, 122 F. 2d, 271. For, as this court has stated, the doctrine *does not* avoid the requirement that upon the whole case, petitioner must prove a breach of the duty of due care by a preponderance of the evidence. *Commercial Molasses Corp. v. New York T. B. Corporation*, 314 U. S., 104. The trial judge heard the facts and drew the following conclusion in his statement to the jury:

> "Now, for the plaintiff to recover against the defendant in this case, he must show negligence against the defendant; that is, he must show that he was injured through the negligence of the defendant acting through some of its employees. I think, as may have been said to you on your voir dire examination, that this is not a situation like we have in Ohio, under the Workmen's Compensation Law, where all a person has to do is show that he was injured while in the performance of his duties. This case comes under a federal law, that is, a law passed by the Congress of the United States, and its only provision is that an employee who is injured may recover against the defendant for the negligence of the defendant. And so, the court comes to the conclusion that this is not the sort of case where negligence may be inferred and there is no proof of negligence." (R., 42)

We believe the trial court's analysis to be sound in legal theory. The petitioner offered testimony of only himself and his doctor. We have already commented on his failure to produce evidence from other members of respondent's train crew. In addition is the fact that any inference of negligence petitioner thinks he raised on direct examination (a matter which respondent unqualifiedly denies) was totally destroyed by petitioner's own testimony on cross examination.

The point we are here emphasizing is that the trial court, in directing a verdict, acted under the well known rule of "reasonable minds." This case was certainly amenable to such a test where evidence of negligence on the part of this respondent was totally lacking. This court has clearly stated that a verdict may be directed in favor of one of the parties when the testimony and all the inferences which the jury can justifiably draw therefrom are insufficient to support a different verdict. *McGuire v. Blount*, 199 U. S., 142; *B. & O. Railroad Co. v. Groeger*, 266 U. S., 521; *Chicago M. & St. P. R. Co. v. Coogan*, 271 U. S., 472; *Chesapeake & O. R. Co. v. Mihas*, 280 U. S., 102. And more than a scintilla of evidence is required. So spoke Mr. Justice Reed in the case of *Brady v. Southern R. Co.*, 320 U. S., 476, stating in the opinion of the court at page 479 as follows:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. Western & A. R. Co. v. Hughes, 278 US 496, 73 L ed 473, 49 S Ct 231, supra; Baltimore & O. R. Co. v. Groeger, 266 US 521, 524, 69 L ed 419, 45 S Ct 169. Cf. Gunning v. Cooley, 281 US 90, 94, 74 L ed 720, 724, 50 S Ct 231; Marion County v. Clark, 94 US 278, 284, 24 L ed 59, 61. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable con-

clusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Petitioner quotes in his brief (p. 10) from *Sweeney v. Erving*, 228 U. S., 233. This decision was amplified and explained in *Gray v. B. & O. R. Co.*, 24 F. 2d, 671, wherein the court after quoting from the *Sweeney* case stated:

"Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury,' the court meant that unexplained, the facts make a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, "it is evidence to be weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'

"If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury, such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, where the Court restated a well known rule: 'The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and shall be directed for the other party' * * *"

This court affirmed a directed verdict for the defendant in the Federal Employers' Liability Act case of *Moore v. Chesapeake & Ohio Railway Co.*, 340 U. S., 573. Mr. Justice Minton, speaking for the court, stated at page 577 as follows:

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and

when it did for no purpose at all, *contrary to all good railroading practice*, prior to the time decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. United States, 319 U. S. 372, 395, 87 L. ed 1458, 1473, 63 S. Ct. 1077.

"Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict." (Emphasis added)

To deny the right of the trial court to direct a verdict here, upon the mere fact that the train stopped where and when it did, would permit speculation to supply the place of proof. It would permit an inference of negligence from the mere fact of injury alone—contrary to the Federal Employers' Liability Act and the judicial interpretation thereof as announced by this court.

IV.

Petitioner's Analysis Fails.

Petitioner, at page seven of his brief, sets forth three interpretations of the Court of Appeals opinion herein. The first has already been given adequate comment. The second, to the effect that the court has placed an almost impossible burden of producing evidence upon the plaintiff, is wholly without merit. It is not because of any "impossible burden" of proof that petitioner's case does not admit of negligence on the part of the railroad. This quite simply is not a case of negligence and petitioner has failed to sustain the burden which the law has most justifiably imposed. Nor does this case establish any conflict of authority. We distinguish the case of *Zumwalt v. Gardner*, 160 F. 2d, 298, cited by petitioner. In that case the plaintiff, a switchman, attempted to board a switch engine when the engine,

for some unknown reason, went into an emergency stop and jarred plaintiff off backwards. The court stated at page 302:

> This occurrence and the circumstances surrounding it furnished evidence from which the jury might have inferred negligence which if not explained or not explained satisfactorily would have supported a verdict for plaintiff. We do not mean by this that this evidence compelled a verdict for plaintiff, but only that it would have warranted such a verdict."

The instant case is to be distinguished in that the reason for the emergency stop is in evidence and is known to this petitioner. In the *Zumwalt* case, some of the testimony was in conflict with admitted physical facts and one of the grounds pleaded was based on the Safety Appliance Act. Neither of these factors are present in the instant case.

Petitioner also seeks support from the case of *Chesapeake & Ohio Ry. Co. v. Smith,* 42 F. 2d, 111. There, the evidence showed that defendant's train was sent down the wrong track through the negligence of the head brakeman in throwing the wrong switch in defendant's switching yards and that after it had proceeded but eight car lengths it came to a sudden stop. The court stated at page 114:

> "But, in view of the brakeman's initial mistake, the violence of the stopping, the fact that the accident occurred in broad daylight, *and the complete absence of any evidence of such a sudden emergency, there seems to be no outstanding probable cause of the accident other than defendant's negligence.*" (Emphasis ours.)

In the case at bar there is no evidence of an "initial mistake" and in the record, rather than "complete absence", there is proof of the emergency and the reason why the engineer, in the exercise of due diligence, stopped the train.

In the case of *Kansas City Southern Railway Company v. Justis,* 232 F. 2d, 267, there likewise was no reason for the sudden stopping of the train in evidence. Judge Cameron, in a dissenting opinion there stated as follows:

> "For the reasons set forth in my dissenting opinion in Texas & Pacific Railway Co. v. Buckles, 5 Cir., 232 F. 2d 257, I think it was error for the Court below to consider or apply the doctrine res ipsa loquitur. I developed in that opinion the general rule that this doctrine was a rule of necessity only, and was applicable only when necessary evidence is absent and not readily available. Here, as there, I think that the facts were fully developed in the evidence."

This action does not involve a defect in equipment and those cases cited by petitioner arising under the Federal Safety Appliance Act have no application here. Passenger cases cited by petitioner are likewise distinguishable in that, "a carrier for hire owes to a passenger the highest degree of care known to the law, whereas the interstate carrier owes to the employee only what we call ordinary care. * * *" *Cochran v. Pittsburgh & L. E. R. Co.*, 31 F. 2d, 769, 772.

Petitioner's third interpretation of the Court of Appeals opinion is to the effect that the court has substituted itself for the jury to determine whether an inference of fact has been rebutted. To this we shall not reiterate the matters set forth at Section III of this brief. Suffice it to say that the result which has obtained in the two lower courts is quite adequately explained by, and justifiably grounded on, the record herein which establishes merely that (1) the circumstances of this case do not warrant application of the doctrine res ipsa loquitur, and (2) any inference of negligence which petitioner believes to have been raised by his testimony was so destroyed upon cross examination as to compel the finding that sufficient evidence to support a verdict was entirely lacking.

In answer to the case of *Chicago & N. W. Ry. Co. v. Green,* 164 F. 2d, 55, to the effect that a directed verdict in a res ipsa loquitur case under the Federal Employers' Liability Act is a situation of rare exception, respondent submits that in this regard, the Federal Employers' Liability Act should not be placed in a class different from any other negligence situation. This court has stated in the case of *Urie v. Thompson,* 337 U. S., 163, that the Federal Employers' Liability Act is founded on *common-law concepts of negligence and injury,* subject to such qualifications as Congress has imported in those terms. While we strongly deny the instant situation as being amenable to res ipsa loquitur, there is no legal justification for the proposition that the Federal Employers' Liability Act requires a different standard by which to measure the test for directing a verdict. Neither Congress nor this court has expressed itself as accepting such an extreme theory.

CONCLUSION.

The record in this case establishes that the facts here do not justify and, in truth, deny the application of res ipsa loquitur and by reason of petitioner's failure to meet the burden which the law has placed upon him, the Court of Appeals was correct in its unanimous affirmance of the action of the trial court in directing a verdict for your respondent. We respectfully submit that this court, on the basis of the precedents established by prior decisions as well as on the basis of justice in legal theory appropriate to the facts herein presented, should affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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